89-2001

No.——

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500
Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Texas Gas Transmission Corporation

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

June 22, 1990

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-1701, 88-1808, 88-1825, 89-1052,
89-1086, 89-1140, 89-1186 and 89-1200

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GENERAL SERVICE CUSTOMER GROUP, INDIANA GAS COMPANY, INC., PANHANDLE EASTERN PIPE LINE COMPANY, THE KANSAS POWER AND LIGHT COMPANY,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued Oct. 12, 1989

Decided Feb. 9, 1990

Stephen J. Small, Boston, Mass., with whom John H. Pickering, Timothy N. Black, Neal T. Kilminister, Susan D. McAndrew, and Richard E. Gottlieb (for Columbia Gas Transmission Corp.), Jeffrey M. Petrash, Washington, D.C., (for Michigan Consol. Gas Co.), Robert A. MacDonnell, Philadelphia, Pa., and Kathleen A. Kane

(for Philadelphia Elec. Co.) were on the joint brief, for listed petitioners in Nos. 88-1701, 88-1808, 89-1052, 89-1086, and 89-1200.

Philip B. Malter, with whom Charles F. Wheatley, Jr. was on the brief, for petitioner Municipal Defense Group in Nos. 88-1825 and 89-1140.

Raymond N. Shibley and Marlene L. Stein, Washington, D.C., were on the brief for petitioner Panhandle Eastern Pipe Line Co. in No. 89-1186.

Frederic J. Georg entered an appearance for petitioner Columbia Gas Transmission Corp., and James H. Holt, Washington, D.C., entered an appearance for petitioner Michigan Consol. Gas Co.

Jill Hall, Atty., F.E.R.C. ("FERC"), with whom Catherine C. Cook, Gen. Counsel, and Jerome M. Feit, Solicitor, FERC, Washington, D.C., were on the brief, for respondent in all cases. Frank Lindh, Washington, D.C., and Joseph S. Davies, Attys., FERC, also entered appearances for respondent.

Raymond N. Shibley, with whom Marlene L. Stein (for Panhandle Eastern Pipe Line Co.), Robert G. Hardy and Michael J. Fremuth (for Transcontinental Gas Pipe Line Corp.), Douglas Field, Jr. and Robert W. Perdue, Washington, D.C., (for Texas Gas Transmission Corp.) were on the joint brief, for intervenors in Nos. 88-1701, 88-1808, 88-1825, 89-1052, 89-1086, 89-1140, and 89-1200.

William H. Penniman (for Process Gas Consumers Group) and Mary E. Baluss and Marilyn A. Specht, Washington, D.C., (for UGI Corp.) were on the joint brief for intervenors in Nos. 89-1052, 89-1086, 89-1140 and 89-1200. Christopher J. Barr, Washington, D.C., also entered an appearance for UGI Corp.

Martin J. Bregman, Topeka, Kan., and Steven J. Kalish, Washington, D.C., entered appearances for in-

tervenor Kansas Power and Light Co. in Nos. 88-1701, 88-1808, and 88-1825.

Before BUCKLEY, D.H. GINSBURG,* and SENTELLE, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

These consolidated cases concern the assertion, by the Federal Energy Regulatory Commission, of the power to approve a retroactive rate increase through exercise of its authority, under section 4(d) of the Natural Gas Act, to waive the thirty days' notice required by that section. As we find that the Commission lacks such power, we remand seven of the cases for action consistent with this opinion and dismiss the eighth as moot.

I. Background

A. Regulatory Background

In section 110(a) of the Natural Gas Policy Act of 1978, Congress provided that sellers of natural gas could lawfully recover

> any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

15 U.S.C. § 3320(a). In July 1980, acting pursuant to this rulemaking authority, the Federal Energy Regulatory Commission ("FERC" or "Commission") informed gas producers that it intended to allow them, as "first sellers" of natural gas, to pass certain field compression and gathering costs through to their pipeline customers

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* Judge Ginsburg heard argument in, but did not participate in the disposition of, this case.

("first purchasers"). Order No. 94, 45 Fed.Reg. 53,099 (1980) ("Order No. 94"). At the same time, the Commission stated that it would not accept applications for the recovery of these costs until it had completed further rulemaking to establish an appropriate generic allowance for such costs ("deferred costs"). *Id.* at 53,107-08. The Commission assured the producers that the new regulations would provide a retroactive mechanism by which they could recover the costs that were determined to be allowable, from the effective date of Order No. 94 until the new regulations took effect. *Id.* The new rules authorizing their recovery were issued almost three years later, in March 1983. Order No. 94-A, 48 Fed.Reg. 5,152 (1983); Order No. 94-B, 48 Fed.Reg. 5,190 (1983).

Under existing procedures, the first purchaser pipelines could recover these deferred charges from their current customers through the purchased gas adjustment clauses ("PGA clauses") authorized by Commission regulations. 18 C.F.R. §§ 154.301-.310 (1988). These clauses, which must be filed with and approved by the Commission, permit pipelines to recover through *prospective* sales the estimated production-related costs they will be required to reimburse producers. Rather than pursue this method, however, five pipeline companies petitioned FERC for permission to "direct bill" customers who had purchased gas produced during the 1980-83 period ("second purchasers") for the deferred costs incurred in its production.

The petitioning pipelines noted that buying patterns in the industry had changed significantly during the three years that had elapsed between the issuance of Order No. 94 and Order No. 94-A. As a consequence, it could not be assumed that the current customers who would have to absorb the newly authorized charges prospectively through PGA clauses were in any way representative of those who, during those three years, had purchased the gas that was subject to the deferred costs. The pipelines argued

that considerations of equity required that those who had purchased that gas pay its true cost through a system of direct billing surcharges based on past purchases.

B. Procedural Background

After the Commission approved each of these petitions,** various second purchasers petitioned for rehearing. When all such requests were denied, Columbia Gas Transmission Corp., The Municipal Defense Group, and Transcontinental Gas Pipe Line Corp. petitioned for review in this court, arguing that the allowance of the direct billing amounted to retroactive ratemaking prohibited by the Natural Gas Act ("NGA" or "Act"). We agreed, struck the orders authorizing direct billing, and remanded the case to the Commission for further proceedings consistent with our opinion. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1142 (D.C. Cir. 1987) (*"Columbia* I").

We based our decision on a finding that the Commission's orders had violated the well-established "filed rate doctrine." This doctrine, we noted, finds its origins in sections 4(c) and 5(a) of the Natural Gas Act, 15 U.S.C. §§ 717c(c), 717d(a), which require that every natural gas company file rate schedules with the Commission that will then govern the amounts they can bill their customers. 831 F.2d at 1140. The purpose of this rule is to maintain predictability in the rates that will be charged, and this purpose is accomplished by the guarantee that rate changes will only be made prospectively. In arriving

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** *Transcontinental Gas Pipe Line Corp.*, 32 F.E.R.C. ¶ 61,230, *reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 F.E.R.C. ¶ 61,493, *reh'g denied*, 33 F.E.R.C. ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032, *reh'g denied*, 33 F.E.R.C. ¶ 61,596 (1985); *Panhandle Eastern Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,231 (1986); and *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,021 (1986).

at our decision, we specifically rejected FERC's contention that Order No. 94 gave "everyone" notice of an impending increase in rates, finding instead that Order No. 94 was "addressed exclusively to first sales of natural gas." *Id.* We thus held that in the absence of such notice, FERC's allowance of direct billing for surcharges on previously purchased gas violated the rule against retroactive ratemaking.

FERC petitioned for rehearing, asserting that notwithstanding our opinion and although the point had not been argued on appeal, the Commission had implied authority, under section 4(d) of the Act, to waive the filed rate doctrine prohibiting retroactive changes in published rates. Section 4(d) provides:

> Unless the Commission otherwise orders, no changes shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. . . . *The Commission, for good cause shown, may allow changes to take effect without providing the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (1982) (emphasis added). The Commission maintained that the waiver issue had "crystallized" only after we had found that the Commission had given inadequate notice to warrant lawful retroactive ratemaking. Presumably, FERC was suggesting that because the filed rate doctrine requires adequate notice of any rate change and because it has the power, under section 4(d), to waive the notice requirement with good cause shown, the Commission may, by dispensing with this impediment, lawfully implement a rate retroactively.

As for the good cause required by section 4(d), FERC found it in the adverse effects that would flow from a

misallocation of the more than $1.5 billion in deferred compression and gathering costs that had accumulated from July 1980 through March 1983. Not only would passing these costs along to current customers place the burden on purchasers of entirely unrelated gas, it would send the wrong market signals by distorting the true cost of current gas supplies.

We declined to rehear the case; but in light of the magnitude of the costs that were involved, we stated that on remand,

> FERC [would be] free to consider the waiver issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinion in this case.

Columbia Gas Transmission Corp. v. FERC, 844 F.2d 879, 880 (D.C.Cir.1988).

On remand, FERC asserted that it had unquestioned authority to waive the filed rate doctrine for good cause shown; and given the unique circumstances of this case, it concluded its previous orders should be reaffirmed and implemented. *Transcontinental Gas Pipe Line Corp.*, 45 F.E.R.C. ¶ 61,169 (1988). The Commission correctly noted that in *Columbia I* we held the direct billing procedure in the circumstances of these cases to violate the prohibition in sections 4(c) and 5(a) of the Act against retroactive ratemaking. Nonetheless, it concluded that irrespective of whether Order Nos. 94 and 94-A constituted notice to downstream purchasers sufficient to overcome the prohibition against retroactive ratemaking, "the overriding public interest in the maintenance of orderly gas markets through the equitable allocation of costs" made it "necessary and appropriate in these proceedings, under section 4(d) of the Natural Gas Act, to waive the filed rate doctrine." *Id.* at 61,488 & n. 26.

Subsequently, in response to a petition by Panhandle Eastern Pipe Line Co. ("Panhandle") for permission to

direct bill its customers, the Commission purported to waive the filed rate doctrine for Panhandle as it had in the cases on remand from this court. *Panhandle Eastern Gas Pipe Line Co.*, 44 F.E.R.C. ¶ 61,173 (1988). Various parties petitioned this court for review. In addition, Panhandle petitioned for review of *Panhandle Eastern Gas Pipe Line Co.*, 45 F.E.R.C. ¶ 61,444 (1988) (Letter Order), in which FERC limited Panhandle to sixty days of accrued interest in its direct billing. The Commission then sought and received this court's order consolidating all of these petitions because of the common legal issues presented.

II. Discussion

A. FERC's Waiver Authority Under Section 4(d)

The Supreme Court has provided the following summary of the filed rate doctrine:

> [T]he Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and *prevents the Commission itself from imposing a rate increase for gas already sold.*

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578, 101 S.Ct. 2925, 2931, 69 L.Ed.2d 856 (1981) (emphasis added).

On remand, the Commission correctly identified the issue before it, and now before us, as "whether the Commission can and, in the circumstances of these cases, should waive the filed rate doctrine." 45 F.E.R.C. at 61,486. The Commission proceeded to resolve immediately the question of its authority to waive the doctrine:

> The Commission's authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned. The only limitation imposed upon the Commission by the statute is that the grant of a waiver must be "for good cause shown."

Id. (citations omitted). It then spent the remainder of its opinion justifying the exercise of its authority in this particular case.

We find the scope of the section 4(d) waiver authority far less obvious than the Commission does. As we observed just three years ago:

> No court has squarely decided whether the Commission's waiver power may extend backward past the original filing date absent the parties' agreement. Indeed, resolution of the conflict between the waiver power and the retroactive ratemaking rule presents difficult questions of statutory interpretation and regulatory policy. . . . [T]he Supreme Court has noted the potential conflict between the ban on retroactive ratemaking and the Commission's waiver power. . . .

City of Girard v. FERC, 790 F.2d 919, 924 (D.C.Cir. 1986) (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.8, 101 S.Ct. 2925, 2930-31 n.8, 69 L.Ed.2d 856 (1981)). We conclude that while the Commission has considerable latitude to waive the notice requirement under section 4(d), its powers do not encompass what it claims in this case.

We begin by observing that FERC's reliance on *City of Girard, supra*, and *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511 (D.C.Cir.1983), for the proposition that its power to waive the filed rate doctrine is unquestioned, 45 F.E.R.C. at 61,486 and n. 12, is completely misplaced. Even a cursory reading of *City of Girard* will show that, far from holding that FERC had unquestioned authority to waive the filed rate doctrine, we took pains to avoid the question and resolved the issue by affirming the Commission's own determination that "good cause" was lacking. 790 F.2d at 924-25. Indeed, in *Girard*, the Commission would arguably have had a stronger case for retroactive action, as the municipality there was requesting only its reclassification into another category, that of full-requirements user, for which a valid tariff was al-

ready in force, rather than, as here, requesting a retroactive change in a valid tariff. Nonetheless, we specifically "decline[d] to address" the issue of whether FERC's waiver power may extend backward past the original filing date. *Id.* at 924. *United Gas Pipe Line Co.*, for its part, is irrelevant to the issue before us. That case dealt with the Commission's power to waive its own regulation prohibiting a certain transportation rate adjustment mechanism, 18 C.F.R. § 154.38(d)(3), *see United Gas Pipe Line Co.*, 707 F.2d at 1509, and not with the waiver of the statutorily grounded filed rate doctrine.

Although the question of FERC's authority to waive the filed rate doctrine was technically left open by prior decisions, we believe the statutory language of section 4(d) and the logic of our decisions in *City of Piqua v. FERC*, 610 F.2d 950 (D.C.Cir.1979), and *Columbia I* deny the Commission the authority it claims. It is clear from the statutory language that section 4(d) is directed at the situation in which a utility, in this case a natural gas company, wishes to make a change in a rate that is already in full legal effect. The section stipulates that "no change [in filed rates] shall be made" by a company "except after thirty days' notice to the Commission and to the public." 15 U.S.C. § 717c(d). Further in the same paragraph, the Commission is given authority, with good cause shown, to "allow changes to take effect without the thirty days' notice herein provided for." *Id.*

It is apparent that this statutory notice, which the Commission may waive on a showing of good cause, is not the notice of prospective rate adjustments to which we referred in *Columbia I* when we stated that the NGA's prohibition against retroactive rate increases might have been overridden if FERC had provided "adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date." 831 F.2d at 1140. That statement was addressed to those circumstances in which the Commission has authorized increases in prices

previously paid by purchasers who were already on notice that the prices they were paying were provisional only.

Thus, in *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C.Cir.1979), this court considered the siuation where a utility provider and a town had contractually agreed upon a new, higher rate to take effect, by terms of the contract, on May 10, 1977. *Id.* at 951. Filing with the Commission was delayed for a few months because of the need to have the agreement approved by local authorities. *Id.* We held in that case that FERC, in approving the agreement, had not engaged in retroactive ratemaking: "the negotiated ratechange was not retroactive; it was prospective from the date of the contract." *Id.* at 954. As the Commission's waiver gave only prospective effect to the rate change, it did not implicate the filed rate doctrine.

The Fifth Circuit reached the same conclusion in *Hall v. FERC*, 691 F.2d 1184 (5th Cir.1982). In that case, the Commission had denied a request for the waiver of statutory notice so that a "favored nations clause" in a filed contract could be given effect. The Commission based its denial on the prohibition against retroactive rate increases. *Id.* at 1191. In finding that the Commission had erred, the court noted that in the circumstances of the case, "the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract." *Id.* at 1192. The court also made another significant observation. Referring to an earlier case for comparison, the court noted that where a company "sought a higher rate than that ever filed with the Commission or contemplated by the rate schedule/contract," then a "purer example of an action for a retroactive rate increase would be difficult to imagine;" thus "a waiver of section 4(d) notice filing requirements was *neither involved nor applicable.*" *Id.* at 1191 (emphasis added).

The Commission acknowledges that courts have found "good cause for granting a waiver" only where the parties had *previously* agreed to a rate change. 45 F.E.R.C. at 61,487 n. 20. It then attempts to distinguish *City of Piqua* and *Hall* by arguing that while the courts have found "good cause" in giving effect to the "intent of the parties" in those cases, that is not the only basis upon which it can show good cause for granting a waiver. *Id.* at 61,487 & n. 20. As it has found that the public interest and equity require the approval of direct billing in these cases, the Commission asserts that it has sufficient cause, under section 4(d), to grant a waiver even without consent of the parties. *Id.*

But here again, the Commission misinterprets those cases where a seemingly "retroactive" rate was approved. *City of Piqua* and *Hall* did not authorize the Commission to impose rate retroactively *because* giving effect to the parties' intent is a policy of the Act and therefore "good cause" within the meaning of section 4(d). Rather, those cases found that because of pre-existing agreements between the parties and the notice that went automatically with them, those rates were not in fact retroactive. *Id.* at 1192; *City of Piqua*, 610 F.2d at 954. *City of Piqua* is quite emphatic about this:

> The retroactive ratemaking rule thus bars . . . the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate. The present situation is immediately distinguishable. In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract.

Id. at 954.

The same principle obtains when the Commission itself places parties on notice (as it did the first sellers and first buyers of natural gas in Order No. 94) that the rates they will be paying are subject to retroactive adjustment at a later date. This procedure, moreover, is squarely analogous to that in section 4(e) of the NGA in which the published rates, by express terms of the statute, remain subject to later modification and are therefore provisional in nature. 15 U.S.C. § 717c(e). Notice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision. This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively.

In sum, we have found no support for the Commission's contention that on a finding of sufficient cause, it has the authority, under section 4(d), to waive the filed rate doctrine. Thus, as the Commission had failed to provide adequate notice to the downstream purchasers that the price they would be paying for gas during the 1980-83 period would be subject to adjustment, the Commission was without authority to impose a retroactive surcharge for whatever cause.

The Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales. We are unaware, however, of any principle in equity or law that empowers an agency to ignore explicit legislative commands in order to mitigate the damage its errors of judgment or rulemaking delays may have caused.

B. FERC's Power to Limit Panhandle's Carrying Cost Recovery

Because we find that direct billing for these charges is unlawful under the Act, it follows that we need not decide the question of the lawfulness of FERC's denial of interest in excess of sixty days to Panhandle.

III. Conclusion

For the reasons discussed above, we hold that as it has no authority, under section 4(d), to waive the filed rate doctrine, the Commission has invalidly reinstated its prior orders. Accordingly, we dismiss as moot the petition in No. 89-1186, grant the other petitions for review, again strike the orders authorizing direct billing, and remand to the Commission for further proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

[Filed April 19, 1990]

The Suggestion For Rehearing *En Banc* of the intervenor pipelines has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

BEFORE: Buckley, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed May 30, 1990]

Upon consideration of the motions for stay of mandate and of the response thereto it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the Court's mandate through June 22, 1990.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-148-007

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP85-170-004

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. RP85-181-002

TEXAS GAS TRANSMISSION CORPORATION

Docket No. RP85-202-002

TRUNKLINE GAS COMPANY

Docket No. RP85-203-003

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER ON REMAND GRANTING WAIVERS

(Issued November 1, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

The five separate proceedings captioned above have been remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit.[1]

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[1] *See Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (1988).

History of These Proceedings

The Commission had issued orders in each of these proceedings[2] granting the five pipeline companies authority to pass on to their purchasers under direct billing procedures certain retroactive production-related gathering and compression costs which the pipeline companies were required to pay their producers and suppliers pursuant to Section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA),[3] and the Commission's Order No. 94 series implementing that section.[4]

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[2] *Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230, *reh'g and clarification denied*, 33 FERC ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493, *reh'g denied*, 33 FERC ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 FERC ¶ 61,032, *reh'g denied*, 33 FERC ¶ 61,359 (1985); *Panhandle Eastern Pipe Line Co.*, 33 FERC ¶ 61,218 (1985), *reh'g denied*, 34 FERC ¶ 61,231 (1986); *Trunkline Gas Co.*, 33 FERC ¶ 61,217 (1985), *reh'g denied*, 34 FERC ¶ 61,021 (1986).

[3] 15 U.S.C. § 3320(a)(2). Section 110(a)(2) allows a first seller of natural gas to charge an amount exceeding the applicable maximum lawful price "to the extent necessary to recover . . . any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

[4] In July 1980, under Order No. 94, *FERC Statutes and Regulations* ¶ 30,178. the Commission allowed gas producers and other NGPA first sellers to recover some production-related costs as add-ons to NGPA ceiling prices. Cost recovery for compressing or gathering gas was postponed, however, pending a rulemaking to fix generic ceilings for these two kinds of production-related costs, and the Commission stated that, in the interim, no applications for recovery of such costs would be accepted. But the Commission, in Order No. 94, assured first sellers that "a retroactive collection procedure will be provided under which the allowance for compression [and gathering] costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *FERC Statutes and Regulations* ¶ 30,178, at p. 31,218. That retroactive collection procedure was set in mo-

Pursuant to Order Nos. 94 and 94-A, producers in 1983 began charging pipeline customers the compression and gathering costs that had built up on deliveries made between July 1980 and March 1983. Pipelines so charged began passing these costs through to their customers under their PGA clauses.[5]

The pipelines soon experienced difficulties in attempting to recover these very substantial retroactive costs from their purchasers in the volatile natural gas market of the mid-1980s. As an alternative to recovering these costs in their PGAs, several pipelines therefore requested authority from the Commission to "direct bill" these costs. Under direct billing a pipeline would calculate each customer's share of the retroactive costs accrued during the years 1980 to 1983 based on that customer's actual purchases during each month to which the retroactive allowances applied. Each customer's total amount due, plus interest, would then be billed and paid in equal installments over several months or, at the customer's option, in a single lump-sum payment.

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tion in March 1983 with the generic allowances of Order No. 94-A and related orders. See generally *FERC Statutes and Regulations* ¶ 30,419 and 18 C.F.R. § 271.1104(e). Order Nos. 94 and 94-A, including the retroactive collection provisions, were affirmed in relevant part in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1967 (1986).

[5] Because these costs were part of the pipeline's cost of purchasing gas, they could be recovered through PGA clauses. 18 C.F.R. §§ 154.301-.310. Additionally, as part of the NGPA first sale price, these costs were guaranteed passthrough under NGPA § 601, which provides that "[f]or purposes of Sections 4 and 5 of the Natural Gas Act," amounts lawfully paid as part of the NGPA first sale price are "deemed to be just and reasonable" and "the Commission may not deny any interstate pipeline recovery of any [such] amount . . . except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." 15 U.S.C. § 3431(c)(2).

After the Commission approved such direct billing procedures in these five proceedings,[6] Columbia Gas Transmission Corporation (Columbia), which purchased gas from the five pipeline applicants during the retroactive period and is a party to each of these proceedings, appealed the Commission's five orders approving the direct billing procedures to the D.C. Circuit.

The court held that the pipelines' direct billing for retroactive production-related costs in the circumstances of these cases violated the prohibition in sections 4(c) and 5(a) of the Natural Gas Act[7] against retroactive ratemaking.[8] While recognizing that the prohibition against retroactive ratemaking "might have been overridden through adequate notice that purchasers would be expected to pay the deferred charges at a later date," the court found that no such notice had been given here. It held that Order Nos. 94 and 94-A provided the required notice only "to a highly restricted audience" of NGPA first sellers and their customers that those sellers could collect for past costs, and not to anyone else.[9] On rehearing, the Court, while declining to alter its earlier decision, did authorize the Commission on remand to consider whether it has the authority to waive the filed rate doctrine[10] in the circumstances of these cases and whether it is appropriate for the Commission to do so.

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[6] *See* n. 2, *supra*, and accompanying text.

[7] 15 U.S.C. § 717c(c), 717d(a). These provisions form the basis for what is generally referred to as the "filed rate doctrine," the parameters of which the Supreme Court, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981), explained to be that "the [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold."

[8] 831 F.2d at 1142.

[9] 831 F.2d at 1140.

[10] *See* n. 7, *supra*, and accompanying text. Under section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), the Commission may "for good cause shown" waive the advance notice requirement for the filing of an alteration in a rate.

Issues on Remand

The scope of the Commission's present analysis has been circumscribed by the court which instructed "that FERC is free to consider the waiver issue" but otherwise reversed the orders issued by the Commission.[11] What must first be considered, therefore, is whether the Commission can and, in the circumstances of these cases, should waive the filed rate doctrine. If these questions are answered in the affirmative, the Commission is then free, consistent with the court's directions, to leave its five previous orders intact. If, however, these answers are negative, a different solution consistent with the court's remand must be found.

Discussion

The Commission's authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned.[12] The only limitation imposed upon the Commission by the statute is that the grant of a waiver must be "for good cause shown." [13]

Here, while the pipelines' customers have opposed direct billing for the retroactive production-related gathering and compression costs, there is no question that the

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[11] *See* 844 F.2d at 880.

[12] *City of Girard v. FERC*, 790 F.2d 919, 925 (D.C. Cir. 1986); *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511 (D.C. Cir. 1983). While the City of Girard case dealt with section 205 of the Federal Power Act, 16 U.S.C. § 824d, it is settled that "the relevant provisions of [the Natural Gas Act] are in all material respects substantially identical to the equivalent provisions of the Federal Power Act." *Appalachian Power Co. v. FPC*, 529 F.2d 342, 344 (D.C. Cir. 1976) (*quoting FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)).

[13] 15 U.S.C. § 717c(d); Section 4(d) of the Natural Gas Act. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 8 (1981).

waiver is in the public interest. In each of these five proceedings, the Commission has previously made findings [14] that the pipelines' direct billing procedures are an equitable and practical method of allocating cost responsibility. Under these procedures, pricing signals are not distorted by the influx of substantial retroactive Order No. 94-A costs. Furthermore, these procedures equitably bill customers for the higher amounts they should have paid for gas based on actual purchases during the past billing periods and more accurately allow the true cost of current gas supplies to be reflected in the pipelines' PGAs. Thus, in approving these procedures, the Commission was only upholding the usual rule that it can use its equitable powers to require utility customers to bear costs incurred for their benefit where the benefits and costs are not simultaneous.[15]

In *Hall v. FERC*, the court stated that "perhaps [the] most compelling reason" for deciding whether a waiver of the filed rate doctrine should be granted or denied is whether a different group of consumers will pay for the gas than the ones who used it.[16] The court there found no evidence showing that the pipeline's customer profile had changed during the relevant period and therefore could neither affirm nor reverse the Commission's denial of the waiver on that basis alone. (The court did reverse the Commission's denial of the waiver, however, based upon lack of substantial evidence to support the four bases for the Commission's denial, including change in

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[14] *E.g., Transcontinental Gas Pipe Line Corp.*, 33 FERC ¶ 61,213, at p. 61,443.

[15] *E.g., Public Systems v. FERC*, 709 F.2d 73, 80, 85-86 (D.C. Cir. 1983). *See also Mid-Tex Electric Cooperative v. FERC*, 773 F.2d 327, 349-50 (D.C. Cir. 1985); *Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985) (recognizing the importance of identifying customers receiving refunds due them).

[16] 691 F.2d 1184, 1192-93 (5th Cir. 1983), *cert. denied sub nom. ARKLA v. Hall*, 464 U.S. 822 (1983).

customer profile. *See* 691 F.2d at 1191, 1198.) There is no question here that the pipelines' customer profiles have changed. As a result, absent waiver, many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current customers will pay these costs for those former customers. Equity and the public interest demand that these costs [17] be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred. Accordingly, we conclude that the public interest is best served by granting the section 4(d) waiver.[18]

The situation here is not analogous to those cases, including *City of Girard v. FERC*,[19] where the rate change involved arose out of a private contract and the parties' consent was considered essential.[20] In those cases, the courts were interpreting private contracts and were operating within the context of the seminal principles that

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[17] This is not a penny-ante matter. Estimates of these costs for all producers range up to $1.5 billion.

[18] It is established that the Commission has broad authority to settle matters fairly. *E.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) ("The breath of agency discretion is, if anything, at [its] zenith" in the "fashioning of policies, remedies and sanctions . . . .") (payback of natural gas at contract, not market, price).

[19] *See* 790 F.2d at 925.

[20] The courts have consistently approved the "Commission's longstanding general policy . . . to find 'good cause [for granting a waiver]' only when the parties to the rate have agreed at some point in their negotiations on an effective date and the waiver is in the public interest." *See City of Girard v. FERC*, 790 F.2d at 924; *Hall v. FERC*, 691 F.2d at 1192; *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979). In circumstances where the parties have agreed upon an effective date, the Commission waiver is not truly retroactive but rather gives "prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract." *Hall v. FERC*, 691 F.2d at 1192.

both the Federal Power Act and the Natural Gas Act were drafted to encourage and protect the right of parties to establish rates by individual contracts and that neither Act "evinces [any] purpose to abrogate private rate contracts as such."[21] In those cases, then, the Commission and courts were merely implementing the parties' intentions as expressed in their private contracts and the public interest was not opposed to such effectuation.[22]

In these proceedings, however, the circumstances mandate that the nature of and necessity for the parties' consent be evaluated in the context of the overriding public interest in the orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which will thereby result.

The proceedings at issue here evolved out of the generic Order No. 94 series which established and implemented the collection by producers from pipelines of reasonable gathering and compression costs.[23] The Commission's direct billing orders were likewise generic to the extent that they implemented the passthrough of these costs to all pipeline customers similarly situated.

It is unreasonable to have expected that pipelines could have formally agreed with their customers (many of whom were by then former customers) whereby those customers would reimburse the pipelines for their Order No. 94 series costs so long as those customers saw any possibility of avoiding these very substantial payments. At the same time, however, those customers, like Columbia, were fully cognizant, from their involvement in the

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[21] *Hall v. FERC*, 691 F.2d at 1193 n. 16 (*quoting United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956)).

[22] *See City of Girard v. FERC*, 790 F.2d at 925; *Hall v. FERC*, 691 F.2d at 1191-92 n. 13.

[23] These orders were expressly authorized in section 110(a)(2) of the Natural Gas Policy Act, 15 U.S.C. § 3320(a)(2).

Order No. 94 series proceedings, that during the 1980 to 1983 period between the issuance of Order No. 94, suspending applications for gathering and compression costs, and the issuance of Order No. 94-A, which effectively lifted that suspension,[24] they were not paying the full cost of the gas volumes they in turn purchased from the pipelines.[25]

In these circumstances, the consent of the pipelines' customers[26] must take a secondary position to the overriding public interest in the maintenance of orderly gas markets through the equitable allocation of costs.

Accordingly, under our equitable powers to fashion remedies effectuating fair results,[27] we conclude that it is necessary and appropriate in these proceedings, under setcion 4(d) of the Natural Gas Act, to waive the filed rate doctrine.

The Commission orders:

(A) For good cause shown, the notice requirement of section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d),

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[24] *See* n. 4, *supra.*

[25] Columbia was obviously aware of the implications of the Order No. 94 series. It participated in those proceedings before the Commission and before the 5th Circuit in the Texas Eastern litigation. *See* 769 F.2d at 1057.

[26] The court found that Order Nos. 94 and 94-A did not constitute notice to downstream purchasers sufficient to override the prohibition against retroactive ratemaking. 831 F.2d at 1140. We are, of course, bound by that finding. We do not believe, however, that in our analysis here of customers' consent to direct billing in the context of waiver of the filed rate doctrine we are prohibited thereby from acknowledging and taking into consideration that these customers were fully aware of the implications of the Order No. 94 series, including the 5th Circuit's upholding of these orders in the Texas Eastern litigation.

[27] *Columbia Gas Transmission Corp. v. FERC,* 750 F.2d at 109; quoted in n. 21, *supra.*

is waived with respect to the five applications for Commission approval of direct billing procedures in these proceedings.

(B) The orders previously issued by the Commission in these proceedings,[28] as clarified and supplemented by this order pursuant to the court's remand orders, shall be complied with and implemented.

Commissioner Langdon voted present.

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[28] *See* n. 2, *supra*.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-148-008

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP85-170-005

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. RP85-181-003

TEXAS GAS TRANSMISSION CORPORATION

Docket No. RP85-202-003

TRUNKLINE GAS COMPANY

Docket No. RP85-203-004

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DENYING REHEARING AND RECONSIDERATION

(Issued January 24, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On November 1, 1988, the Commission issued its "Order on Remand Granting Waivers" in the five above-captioned proceedings.[1] In that order, the Commission, pursuant to

[1] 45 FERC ¶ 61,169 (1988).

its authority under section 4(d) of the Natural Gas Act,[2] granted waivers of the filed rate doctrine to the five pipeline companies named above, thereby permitting them to pass on to their purchasers under direct billing procedures certain retroactive production-related gathering and compression costs which the pipeline companies were required to pay their producers and suppliers pursuant to section 110(a)(2) of the Natural Gas Policy Act of 1978,[3] and the Commission's Order No. 94 series implementing that section.[4] The order describes the history of these proceedings as well as the Commission's Order No. 94 series proceedings.

Timely requests for rehearing of the Commission's November 1, 1988 order have been filed by Columbia Gas Transmission Corporation (Columbia), Michigan Consolidated Gas Company (Mich Con), and, jointly, Philadelphia Electric Company and Philadelphia Gas Works (Philadelphia). For the reasons set forth below, we are denying these requests for rehearing.[5]

The common argument raised on rehearing is that the Commission erred in granting waiver of the filed rate doctrine to the pipeline companies in the circumstances of these cases because the pipeline companies' purchasers never consented to the direct billing procedures for the retroactive production related gathering and compression costs. Absent such consent, assert the applicants for rehearing, the Commission is imposing a retroactive rate increase upon the customers of the pipeline companies in violation of the ban against retroactive ratemaking.[6]

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[2] 15 U.S.C. § 717c(d) (1982).

[3] 15 U.S.C. § 3320(a)(2) (1982).

[4] *See* 45 FERC at p. 61,485 n. 4 (1988).

[5] On December 29, 1988, the Municipal Defense Group filed a motion for reconsideration raising the same objections as the applicants for rehearing. We will also deny that motion.

[6] *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 8 (1981).

Mich Con asserts, further, that even if the Commission has the authority here to waive the filed rate doctrine, the necessary good cause, in the form of truly extraordinary circumstances warranting waiver, has not been demonstrated. In addition, Columbia asserts that since the Commission's decision to grant waivers here is inconsistent with its prior practice of permitting waiver only when the contracting parties agreed to a retroactive date, the Commission must acknowledge the change and substantiate the reason for the change and it has not done so here. Finally, Philadelphia argues that the Commission's "equitable powers to fashion remedies effectuating fair results" [7] can only be used in a manner consistent with the Natural Gas Act's ban on retroactive ratemaking, not to circumvent that ban.

In the November 1, 1988 order, we discussed the absence of agreement by the pipeline companies' customers and concluded that, in the circumstances of these cases, the consent of these customers must take a secondary position to the overriding public interest in the maintenance of orderly natural gas markets through the equitable allocation of costs.[8] We distinguished those cases [9] cited by the applicants for rehearing where good cause for waiver of the filed rate doctrine was found "only when the parties to the rate have agreed at some point in their negotiations on an effective date." [10]

In those cases, we stated, the rate changes had arisen out of private contracts and the Commission and courts were merely implementing the parties' mutual intentions

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[7] 45 FERC at p. 61,488.

[8] We indicated that the magnitude of these costs for all producers approached $1.5 billion. *See* 45 FERC at p. 61,487 n. 17.

[9] *City of Girard v. FERC*, 790 F.2d 919 (D.C. Cir. 1986); *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982); *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

[10] *City of Girard v. FERC*, 790 F.2d at 925.

(or lack thereof) with respect to an effective date as expressed in their contracts. Furthermore, we indicated that in those cases not only was the public interest not opposed to such effectuation, but it was actually served by implementing the parties' expressed intentions in a manner consistent with the policies embodied in the Federal Power Act and the Natural Gas Act encouraging and protecting parties' rights to establish rates by individual contracts. We found, in summary, that in the particular circumstances of these cases, the equitable results from granting the waivers alone satisfied the good cause requirement under section 4(d) of the Natural Gas Act and so, acting pursuant to our equitable powers to fashion remedies effectuating fair results, we granted the waivers.[11]

While it is certainly true, as we stated in our order of November 1, 1988,[12] and as the applicants for rehearing have argued, that the Commission in the past has, with judicial approval, considered the good cause requirement of section 4(d) of the Natural Gas Act (and the equivalent section 205(d) of the Federal Power Act) to be satisfied in circumstances where the parties to a rate have agreed at some point in their negotiations on an effective date and the waiver is in the public interest,[13] we believe that the element of the parties' agreement was a product of the particular facts in those cases and does not alter the underlying principle that the Commission's satutory

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[11] While customers' consent was lacking, we stated in our previous order that the customers, like Columbia, were fully cognizant, from their involvement in the Order No. 94 series proceedings, that during the 1980 to 1983 period between the issuance of Order No. 94, suspending applications for gathering and compression costs, and the issuance of Order No. 94-A, which effectively lifted that suspension, they were not paying the full cost of the gas volumes they in turn purchased from the pipelines. *See* 45 FERC at p. 61,488 and n. 26.

[12] 45 FERC at p. 61,487 n. 20.

[13] *E.g., City of Girard v. FERC,* 790 F.2d at 925.

authority to waive the filed rate doctrine for "good cause" rests upon equitable implementation of what we perceive to be in the public interest.[14]

In each of the cases relied upon for the proposition that the parties' consent is essential to a finding of good cause, the relevant agreement on an effective date for a rate was that between the parties in their original contract (or asserted contract) and each case arose, in the first place, because one of the parties to the original agreement had breached or otherwise failed to comply with its terms,[15] or was asserting that an agreement with respect to an effective date did in fact exist.[16] In each case, therefore, the parties' consent was a relevant factor only to the extent a private rate contract was all that was involved and only because, in such circumstances, the policies of the Federal Power and Natural Gas Acts encouraging and protecting parties rights to establish rates by individual contracts and the public interest in holding parties to their contractual agreements were both served thereby. In short, in these cases consent was a collateral element of the public interest; it was not, in and of itself, an essential element of good cause.[17] Consent, to our view, has never been a *sine qua non* for granting waivers. It is merely an incident in our determination of where the public interest lies.

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[14] The underlying purpose of the Natural Gas Act is protection of the consumer. *See Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959).

[15] *Hall v. FERC*, 691 F.2d 1184; *City of Piqua v. FERC*, 610 F.2d 950.

[16] *City of Girard v. FERC*, 790 F.2d 919.

[17] Since, as we indicated in our previous order (45 FERC at p. 61,488), it was unreasonable to expect agreement among the pipelines' many customers to reimburse the pipelines for their Order No. 94 costs, it clearly would not be in the public interest to permit just one such customer to refuse to agree and thereby distort the entire direct billing mechanism and, in the process, usurp the public interest.

Where, however, as is the case in the instant proceedings, requiring consent in order to grant the waivers would impede the otherwise overwhelming public interest in granting them,[18] consent is irrelevant.[19] Accordingly, we deny the requests for rehearing and the motion for reconsideration.

The Commission orders:

(A) The requests for rehearing filed by Columbia Gas Transmission Corporation, Michigan Consolidated Gas Company, and, jointly, Philadelphia Electric Company and Philadelphia Gas Works are denied.

(B) The motion for reconsideration filed by the Municipal Defense Group is denied.

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[18] In our initial order here, we described the negative effects to the industry of not granting waivers in these proceedings. *See* 45 FERC at pp. 61,487-61,488.

[19] We do not, therefore, see this analysis as reflecting a change in policy as Columbia has asserted.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP88-203-000

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER GRANTING AUTHORITY TO IMPLEMENT DIRECT BILLING PROCEDURE

(Issued July 29, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

On June 30, 1988, Panhandle Eastern Pipe Line Company (Panhandle) filed a petition for authority to institute a direct billing procedure to recover from its customers production-related costs pursuant to Order No. 473.[1] It also requests waivers of the Commission's regulations and the provisions of Panhandle's tariff as may be required to permit the use of the direct billing procedure.

Panhandle proposes to bill each jurisdictional customer directly for its pro rata share of specific Order No. 473 costs which have actually been paid by Panhandle to one of its producer-suppliers, Phillips 66 Natural Gas Company (Phillips), together with the appropriate interest calculated in accordance with the Commission's regula-

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[1] Compression Allowances and Protest Procedures Under NGPA Section 110, Order No. 473, *FERC Statutes and Regulations* ¶ 30,747, *reh'g granted in part*, Order No. 473-A, *FERC Statutes and Regulations* ¶ 30,788 (1987).

tions. Panhandle proposes that the jurisdictional portion of the payment be allocated among its jurisdictional customers based on the proportion of sales to each customer during the period December 1, 1979 through December 31, 1984, to the total sales during that same period. This time frame corresponds to the period during which Panhandle paid the Order No. 473 amount to its producer-supplier.

Background

In Order No. 473, the Commission amended 18 C.F.R. § 271.1104 to permit first sellers of natural gas to collect allowances for the cost of fuel or power required to drive compression facilities upon which construction commenced prior to enactment of the NGPA. The Commission permitted producers to collect these amounts retroactively from August 10, 1987 back to July 25, 1980, or any earlier date on which the producer filed an application with the Commission to recover NGPA Section 110 production-related costs. Direct billing of certain compressor costs has previously been approved by the Commission.[2]

Description of the Filing

Panhandle proposes to collect by the direct billing procedure, $15,715,672.68 (including interest) from its jurisdictional customers. Panhandle states that the above amount is the jurisdictional portion of the compressor costs paid to its producer-supplier (Phillips) and proposes that these costs be allocated among its jurisdictional customers according to the ratio of each customer's total jurisdictional sales during the period December 1, 1979 through December 31, 1984, to the total sales during the same period. Panhandle filed tariff sheets[3] which set

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[2] *See CNG Transmission Corp.*, 42 FERC ¶ 61,227 (1988): *National Fuel Gas Supply Corp.*, 43 FERC ¶ 61,283 (1988).

[3] Nineteenth Revised Sheet Nos. 3-C.1, 3-C.2 and 3-C.3 to FERC Gas Tariff, Original Volume No. 1.

forth the resulting amount allocated to each of its jurisdictional customers and requests an effective date of August 1, 1988 to implement the proposal.

In addition, Panhandle has supplied a schedule detailing how the allocation is to be accomplished and the individual customer sales data and resulting amounts of Order No. 473 costs. The schedule alsc shows the cost allocation between Panhandle's jurisdictional and non-jurisdictional sales customers of the total Order No. 473 payment.

Panhandle proposes to bill each customer on August 10, 1988, for the amount allocated to each customer, including interest. Each customer will have the option of paying its allocated amount in twelve monthly installments pursuant to the monthly billing procedures contained in Panhandle's tariff. Additional interest will be calculated if the customer chooses to pay in twelve monthly installments.

Because several of its firm sales contracts will expire prior to completion of the twelve month installment period, Panhandle requests that the Commission require that its customers' obligation to pay such amounts be extended until the amounts are paid in their entirety.

To account for the direct billing procedure, Panhandle proposes to establish a separate Account No. 191 sub-account. Panhandle will debit the sub-account with the Order No. 473 payments and would credit the amounts received from its customers under the direct billing procedure.

Panhandle maintains that the direct billing proposal is the most equitable and appropriate method of allocating such costs because it matches these costs to each customers' respective purchases during the period in which the costs were incurred. It contends that recovery of these payments through the normal PGA mechanism would be inappropriate because a customer could avoid its fair share of the costs by reducing future purchases.

Public Notice, Motions to Intervene and Protests

Public notice of Panhandle's filing was issued on July 7, 1988, providing for protests, motions or notices to intervene to be filed on or before July 14, 1988. Timely notices or motions to intervene were filed by the parties listed in Appendix A to this order. Pursuant to Rule 214 (18 C.F.R. § 385.214 (1987)) any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in Appendix A are also granted in accordance with Rule 214.

Several parties filed petitions contesting Panhandle's direct billing proposal. Michigan Gas Storage Company (MGSC) requests that the proposed effective date of the proposal be suspended pending further investigation. MGSC states that it has several questions regarding the filing that should be resolved before the filing is accepted. Specifically, MGSC questions Panhandle's allocation of $2.02 million of these costs to MGSC, the circumstances surrounding the incurrence of Order No. 473 costs, and whether Panhandle has provided sufficient good cause to obtain a waiver of the Commission's regulations and the filed rate doctrine.

Columbia Gas Transmission Company (Columbia), Kansas Power and Light Company (KP&L), Michigan Consolidated Gas Company (MichCon), and Municipal Defense Group (MDG) oppose the direct billing proposal as violative of the filed rate doctrine and the prohibition against retroactive ratemaking.

Discussion

The Commission finds that Panhandle's direct billing proposal is an equitable and practical method of allocating cost responsibility for these past period Order No. 473 costs. Panhandle's proposal is similar to other Order No.

473 proposals which were accepted by the Commission.[4] While the Commission declined to adopt a general rule for the direct billing of compressor facility costs in Order No. 473, it stated that it would be receptive to filings by pipelines to implement direct billing mechanisms where appropriate.[5]

Appropriate circumstances are present in this case. The costs which Panhandle seeks to recover are nonrecurring out-of-period costs. An attempt to recover such costs through the PGA mechanism would allow customers to escape cost liability by reducing future purchases from Panhandle. The direct billing mechanism provides a fair and accurate method of allocating cost responsibility according to the purchases of Panhandle's customers during the period in which these costs were incurred.

The intervenors argue that acceptance of Panhandle's proposal will constitute a violation of the filed rate doctrine and the prohibition against retroactive ratemaking. The intervenors argue that it is a well established principle of ratemaking that natural gas customers cannot be retroactively assessed increased charges without prior notice.[6] In *Columbia*, the court found that direct billing mechanisms approved by the Commission under Order Nos. 94 and 94-A[7] could not be lawfully imposed without

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[4] *See supra* note 2.

[5] Order No. 473 at p. 30,673.

[6] *Citing Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *aff'd on rehearing*, 844 F.2d 879 (D.C. Cir. 1988); *see also Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

[7] Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980), *reh'g granted in part*, Order No. 94-A, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,419, *modified*, Order No. 94-B, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,421, *reh'g denied*,

proper notice. However, on rehearing of *Columbia*, the court affirmed that on remand the Commission was free to consider whether waiver of the filed rate doctrine is warranted in view of the magnitude of the costs at issue.[8]

Here, equity demands that Panhandle be granted a waiver of the notice requirement to permit implementation of the direct billing procedure which will allow Panhandle to collect production-related costs from those customers who caused their incurrence. Failure to grant a waiver under these circumstances would result in Panhandle having to absorb costs which its suppliers are expressly authorized to collect and which it is entitled to recoup from its customers. Furthermore, a pipeline's authorization to recover these costs does not restrict the rights of interested parties to contest the propriety of individual Order No. 473 payments. Since the protest procedure gives both pipelines and their customers the opportunity to challenge the authority of gas suppliers to collect these costs, the Commission does not believe that a notice requirement is also necessary to protect customers.

Accordingly, the direct billing proposal submitted by Panhandle is approved subject to the following conditions:

(A) Panhandle is required to identify the specific contracts with Phillips to which the Order No. 473 costs pertain.

Order No. 94-C, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,454, *reh'g denied*, Order No. 94-D, 23 FERC ¶ 61,279, *clarified*, Order No. 94-E, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,528 (1983), *clarified further*, Order No. 94-F, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,654, *reh'g denied*, Order No. 94-G, 32 FERC ¶ 61,433 (1985). Order No. 94-A was affirmed in part in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1967 (1986). The rulemaking proceeding that culminated in the issuance of Order No. 473 originated as a consequence of the court's remand in the Texas Eastern case.

[8] Columbia, 844 F.2d at 880; *see generally City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

(B) Panhandle is required to provide workpapers detailing its calculation of the amount to be charged its customers and the specific cost allocation to each customer.

(C) Panhandle is required to state the date that it first received a billing for Order No. 473 costs from Phillips, and to explain the reason for Panhandle's delay in filing to recover these costs.

In addition, the Commission shall require that any customer who elects to pay its direct billed costs over a twelve-month installment period be charged additional interest calculated in accordance with section 154.102(c) of the Commission's regulations.[9]

The Commission orders:

(A) Panhandle's tariff sheets listed in footnote 3 of the order are accepted for filing subject to the conditions contained in the order.

(B) Waiver of the Commission's regulations and of Panhandle's tariff is granted to the extent necessary to effectuate the direct billing procedure.

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[9] 18 C.F.R. § 154.102(c) (1987).

APPENDIX A

Citizens Gas & Coke Utility

Missouri Public Service Division of Utilicorp United, Inc.

Northern Indiana Public Service Company

Illinois Commerce Commission

Illinois Power Company

General Service Customer Group

East Ohio Gas Company

Indiana Gas Company

Michigan Gas Storage Company*

Michigan Consolidated Gas Company*

Kansas Power & Light Company*

Municipal Defense Group*

Columbia Gas Transmission Corporation*

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* Denotes parties that have also protested filing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP88-203-001

PANHANDLE EASTERN PIPE LINE COMPANY

NOTICE OF DENIAL OF REHEARING
BY OPERATION OF LAW

(Issued September 21, 1988)

Lois D. Cashell, Acting Secretary.

On August 26, 1988, Columbia Gas Transmission Corporation and Michigan Consolidated Gas Company filed requests for rehearing of the Commission's order in the above-captioned docket issued on July 29, 1988.[1] On August 29, 1988, Municipal Defense Group filed a request for rehearing of the July 29 order. That order granted Panhandle Eastern Pipe Line Company waiver of the Commission's notice requirement and approved the implementation of a direct billing procedure to recover from its customers production related costs pursuant to Order No. 473.[2]

Take notice that the Commission determined to take no action on the requests for rehearing. Accordingly, the requests for rehearing are denied by operation of law pursuant to Rule 713(f) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713(f)).

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[1] 44 FERC ¶ 61,173 (1988).

[2] Compression Allowances and Protest Procedures Under NGPA Section 110, Order No. 473, *FERC Statutes and Regulations* ¶ 30,747, *reh'g granted in part*, Order No. 473-A, *FERC Statutes and Regulations* ¶ 30,788 (1987).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-1846, 85-1847, 86-1021, 86-1074,
86-1082, 86-1164 and 86-1187

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, PHILADELPHIA GAS WORKS, PHILADELPHIA ELECTRIC COMPANY, BAY STATE GAS COMPANY, *et al.*,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued Dec. 15, 1986

Decided Oct. 27, 1987

Richard L. Gottlieb, Charleston, W.Va., for petitioner Columbia Gas Transmission Corp. in Nos. 85-1846, 85-1847, 86-1074, 86-1082 and 86-1164. Steve H. Finch, G.D.H. Snyder, and S.J. Small, Charleston, W.Va., entered appearances for Columbia Gas Transmission Corp.

Philip B. Malter, with whom Charles F. Wheatley, Jr., Annapolis, Md., and Paul M. Flynn, Washington, D.C.,

were on the brief, for petitioner Mun. Defense Group in No. 86-1187.

Michael J. Fremuth, with whom Thomas F. Ryan, Jr., and Robert G. Hardy, Washington, D.C., were on the brief, for Transcontinental Gas Pipe Line Corp., petitioner in No. 86-1021 and intervenor in No. 85-1847; and on the joint brief for intervenor pipelines, with Bolivar C. Andrews, Carl W. Ulrich, Judy M. Johnson, and J. Stephen Martin, Houston, Tex., for intervenor Texas Eastern Transmission Corp.; William Douglas Field, Jr., Owensboro, Ky., and Michael R. Waller, Houston, Tex., for intervenor Texas Gas Transmission Corp.; Raymond N. Shibley, Lawrence G. Acker, and Patrick J. Whittle, Washington, D.C., for intervenors Trunkline Gas Co. and Panhandle Eastern Pipe Line Co. Thomas R. Sheets, Houston, Tex., also entered an appearance for intervenor Texas Eastern Transmission Corp.

John H. Conway, Atty., F.E.R.C., for respondent. Barbara J. Weller, Sol., and A. Karen Hill, F.E.R.C., Washington, D.C., were on the brief, for respondent.

Glenn W. Letham and Joshua L. Menter, Washington, D.C., were on the brief, for intervenor Memphis Light, Gas & Water Div. in No. 86-1074.

John Sandor, Washington, D.C., was on the brief for amicus curiae The Nat. Ass'n of Consumer Owned Gas Systems, urging reversal.

Frank P. Saponaro, Jr. and Jennifer K. Walter, Washington, D.C., entered appearances for intervenor Philadelphia Gas Works.

James R. Lacey, Newark, N.J., entered an appearance for intervenor Public Service Elec. and Gas. Co.

Robert A. MacDonnell, Philadelphia, Pa., entered an appearance for intervenor Philadelphia Elec. Co.

John S. Schmid, Washington, D.C., entered an appearance for intervenors Bay State Gas Co., et al.

John E. Holtzinger, Jr., John T. Stough, Jr., and Jacolyn A. Simmons, Washington, D.C., entered appearances for intervenor Atlanta Gas Light Co.

Stanley M. Morley, Joel F. Zipp, and Paul W. Diehl, Washington, D.C., entered appearances for intervenor South Carolina Pipeline Corp.

Nusha Wyner, Newark, N.J., Stanley W. Balis, and Susan N. Kelly, Washington, D.C., entered appearances for intervenor Public Advocate of New Jersey.

Frank H. Strickler and Gordon M. Grant, Washington, D.C., entered appearances for intervenor Washington Gas Light Co.

David E. Blabey, Albany, N.Y., Richard A. Solomon, and David D'Alessandro, Washington, D.C., entered appearances for intervenor Public Service Com'n of the State of N.Y.

Jerry W. Amos, Greensboro, N.C., entered an appearance for intervenor Piedmont Natural Gas Co., Inc.

William W. Ross and Daniel L. Koffsky, Washington, D.C., entered appearances for intervenor Consumers Power Co.

James H. Holt and Jeffrey M. Petrash, Detroit, Mich., entered appearances for intervenor Michigan Consol. Gas. Co.

John R. Schaefgan, Jr. and Richard M. Merriman, Washington, D.C., entered appearances for intervenors General Customer Service Group, et al.

Before BUCKLEY and WILLIAMS, Circuit Judges, and GERHARD A. GESELL,* U.S. District Judge for the District of Columbia.

Opinion for the Court filed by Circuit Judge BUCKLEY.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

BUCKLEY, Circuit Judge:

Petitioners challenge Federal Energy Regulatory Commission orders permitting five pipelines to recover a surcharge from their customers on gas already sold to them. The amount of the surcharge would, in effect, reimburse the pipelines for the amounts that the pipelines had subsequently been required to pay to producers for certain deferred production-associated costs. The principal issue in these cases is the propriety, under the governing statutes, of such a surcharge.

We conclude that the Commission exceeded its authority when, without proper notice, it approved what in effect were retroactive increases in the price of natural gas previously sold by the pipelines to their customers.

I. Background

Under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982), natural gas companies are required to keep on file with the Federal Energy Regulatory Commission ("FERC" or "Commission") "schedules showing all rates and charges for any transportation or sale [of natural gas] subject to the jurisdiction of the Commission." 15 U.S.C. § 717c(c) (1982). Under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (1982), Congress established ceiling prices for "first sales" (typically sales by producers to pipeline companies ("first purchasers")) of various categories of natural gas. 15 U.S.C. §§ 3312-3319 (1982). In section 110 of the NGPA, Congress permitted natural gas producers to charge for certain production-related costs in excess of the ceiling prices established under the NGPA:

> [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maxi-

mum lawful price to the extent necessary to recover.—

* * * *

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

15 U.S.C. § 3320(a) (1982).

Upon enactment of the NGPA, the Commission immediately issued, and at the same time sought public comment on, interim regulations to implement section 110. Interim Regulations Implementing the Natural Gas Policy Act of 1978 §§ 271.101-271.1106, 43 Fed.Reg. 56,448, 56,552-77 (1978). The Interim Regulations did not implement every provision of the NGPA, but merely proposed guidelines to deal with those areas demanding the most immediate attention. *Id.* at 56,452. Part 271 of the Interim Regulations specified the maximum lawful prices applicable to first sales of natural gas. *Id.* at 56,-552. Subpart K prescribed "regulations under which a price for a first sale of natural gas shall not be considered to exceed the applicable maximum lawful prices set forth in Part 271 if such first sale price exceeds the maximum lawful price to the extent necessary to recover . . . production related costs approved by order of the Commission under § 271.1105." *Id.* at 56,574.

In 1980, FERC amended Subpart K to, *inter alia*, (1) allow sellers of committed or dedicated natural gas under the NGPA to apply for production-related costs in excess of NGA allowances, (2) permit certain sellers of natural gas to collect NGA allowances without applications, and (3) provide for a new category of production-related costs ("other costs"). Order No. 94: Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 45 Fed.Reg. 53,099 (1980).

In the same order, the Commission announced that it would not accept applications for "compression costs" until the Commission completed proceedings to determine an appropriate generic allowance:

> Compression is perhaps the single most complex cost category which we must consider for a production-related add-on. First, of the activities specifically listed under section 110, compression, more than any other, can be undertaken as a production or non-allocable activity. Second, no standard or prevailing industry practice now exists for determining the costs of compression. This means that a seller seeking to add-on compression costs must make a showing as to the costs incurred and the type of compression undertaken. If this must be done case-by-case for each seller there is a potential for long delay and inconclusive results. Rather than this approach (which was the approach of the interim regulations issued in December 1978), we believe that an appropriate allowance for compression can be determined which would apply for specific kinds of compression. To this end we will inaugurate a generic proceeding to determine the appropriate allowance. . . . During the pendency of the proceeding, in our exercise of discretion, we will accept no applications for compression costs.

Id. at 53,107 (footnote omitted). The Commission initiated the same kind of proceeding to establish an appropriate generic allowance for "gathering costs." *Id.* at 53,108. The Commission assured first sellers that a "retroactive collection procedure will be provided under which the allowance for compression [and gathering] costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *Id.* at 53,107 (footnote omitted).

In the meantime, first purchasers of the gas had recourse to an existing method for recovering these additional estimated costs from their customers; namely, a system of *prospective* charges called "purchased gas adjustment clauses" ("PGA clauses"). 18 C.F.R. § 154.38(d)(4) (1987). PGA clauses, like rates, must be filed with and approved by the Commission before being put into effect. Proposed PGA clauses must also be accompanied by cost studies "based upon actual costs for the 12 months of most recently available actual experience." 18 C.F.R. § 154.38(d)(4)(i). This mechanism thus permits pipelines to recover through prospective sales, on the basis of reasonably current calculations, the fluctuating production-related costs they are required to reimburse producers.

In 1983, the Commission issued Order Nos. 94-A, 48 Fed.Reg. 5,152 (1983), and 94-B, 48 Fed.Reg. 5,190 (1983), containing its long-promised regulations addressing generic compression and gathering cost allowances. These orders authorized natural gas producers to recover retroactively from first purchasers the costs incurred by the producers in the delivery and compression of natural gas ("deferred costs") delivered to the pipelines prior to March 7, 1983 (the effective date of Order Nos. 94-A and 94-B), but after July 25, 1980 (the effective date of Order No. 94) or the date on which the producer filed an application with the Commission for reimbursement of the deferred costs, whichever was earlier. 18 C.F.R. § 271.1104(e) (1987).

A number of first purchaser pipeline companies sought to pass these costs on to their customers ("downstream purchasers"). To this end, they petitioned FERC for permission to bill their customers directly for the customers' pro-rata shares of these deferred expenses, such billing to take the form of a surcharge for gas purchased by each customer during the three-year period between the issuance of the interim order (Order No. 94) and the final orders (Order Nos. 94-A and 94-B). In five cases,

the Commission issued orders * granting pipeline companies permission to do so. The "direct billing" method for reimbursement is described in the proposal submitted by Transcontinental Gas Pipeline Corp. ("Transco") and approved by the Commission. Under its terms, Transco undertook

> to calculate each customer's share of the retroactive allowances based on each customer's actual purchases during each month to which the retroactive allowances apply. Each customer's total amount due, plus interest, will then be billed and paid in equal installments over a twelve-month period, or paid in a single lump-sum payment at the customer's option.

32 F.E.R.C. ¶ 61,230 at 61,543. Thus, in contrast with the prospective PGA clause mechanism, the direct billing procedure was designed to provide pipelines with a method for recovering retroactively, through a system of surcharges, the amounts the Commission determined they were required to reimburse producers for production-associated costs that had accrued during the three-year period.

Petitioners have appealed each of the five orders. Columbia Gas Transmission Corp. and the Municipal Defense Group (representing a number of distribution companies that purchase natural gas from pipeline companies) challenge the legality of direct billing on the ground that it constitutes retroactive ratemaking prohibited by the Natural Gas Act. Columbia Gas also asserts that the direct billing procedure is inconsistent with FERC's own

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* *Transcontinental Gas Pipe Line Corp.* ["*Transco*"], 32 F.E.R.C. ¶ 61,230, *reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 F.E.R.C. ¶ 61,493, *reh'g denied*, 33 F.E.R.C. ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032, *reh'g denied*, 33 F.E.R.C. ¶ 61,359 (1985); *Panhandle Eastern Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,231 (1986); and *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,021 (1986).

precedent, and that the PGA clause mechanism is the only method (aside from filing for rate increases) that is authorized for recovering such additional expenses.

The Commission, supported by various intervening pipeline companies, defends its approval of the direct billing procedure on the basis of its equitable results, as it would require customers to pay the actual cost of the gas they have purchased. The Commission also argues that its orders do not constitute retroactive rulemaking because the Commission's 1980 and 1983 orders provided adequate notice that the deferred costs would be passed along to the pipelines and their customers.

Although Transco supports the concept of direct billing, it challenges FERC's decision to apply a different rate of interest on amounts previously collected under PGA clauses that Transco must now refund to customers and the rate it may apply in calculating the total amount to be recovered from them through direct billing. The Commission has admitted that its consideration of this issue was based on error and, on November 24, 1986, it moved that we remand this one issue for further consideration.

II. Analysis

A. *The Rule Against Retroactive Ratemaking*

Both Columbia and the Municipal Defense Group challenge direct billing as constituting retroactive ratemaking and therefore contrary to law. The Commission defends its decisions to allow pipeline companies to directly bill their customers for deferred production-related expenses on the basis of an equitable result:

> "The Commission . . . determined that allocating these costs to the pipelines' customers on the basis of volumes purchased at the time the costs were incurred "will equitably bill customers for the higher amounts they should have paid based on actual purchases during the past billing periods." This is a

> sound reason for adopting the direct billing method; thus the Commission's choice of that method is rationally based.

Brief for Commission at 13 (quoting *Transco, reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 at 61,443); *see also, e.g., Transco*, 32 F.E.R.C. ¶ 61,230 at 61,543 ("[Transco's proposal] is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Above all, it will break up the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility."). The Commission further argues that "Order Nos. 94 and 94-A put everyone on notice that these compression and gathering costs would be retroactively collected, once the Commission determined the appropriate method and dollar amount." Brief for Commission at 14 (citing *Transco*, 32 F.E.R.C. ¶ 61,230 at 61,544-45, and 33 F.E.R.C. ¶ 61,213 at 61,443).

Although the parties have mounted an extensive semantic battle over whether the FERC orders amount to retroactive ratemaking (or rate authorization), the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA. While that prohibition might have been overridden through adequate notice that purchasers would be expected to pay the deferred charges at a later date, Order Nos. 94 and 94-A did not constitute such notice. Because they were addressed exclusively to *first sales* of natural gas, they cannot be deemed to have placed downstream purchasers on notice that they in turn would be expected to absorb those costs through a system of surcharges collected after the fact. Thus there is no support for the Commission's assertion that its orders "put *everyone* on notice."

The rule against retroactive ratemaking is derived from the provisions in the NGA requiring sellers of natural gas to file their rates with the Commission and defining its authority to modify them. The pertinent statutory language reads as follows:

> Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, . . . and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sales subject to the jurisdiction of the Commission. . . .

15 U.S.C. § 717c(c).

> [T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company. . . .

15 U.S.C. § 717d(a).

These provisions form the basis for the "filed rate doctrine." In its discussion of the doctrine in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-78, 101 S.Ct. 2925, 2929-30, 69 L.Ed.2d 856 (1981), the Supreme Court notes that

> the [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

Id. at 578, 101 S.Ct. at 2931. Moreover, the Court explicitly states, in a footnote, that "the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations. . . ." *Id.* at n. 8 (emphasis in original) (citing *FPC v. Sunray DX Oil Co.*,

391 U.S. 9, 24, 88 S.Ct. 1526, 1534, 20 L.Ed.2d 388 (1968)).

We have recently had occasion to explain, in the case of electrical utilities, the rationale for prohibiting retroactive increases in filed rates:

> The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, . . . but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."

Electrical Dist. No. 1 v. FERC, 774 F.2d 490, 493 (D.C. Cir.1985) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981)). Although FERC claims that "Order Nos. 94 and 94-A gave notice that the prices paid for gas during the pendency of the Commission's rulemaking were not final prices," Brief for Commission at 16, the orders were explicitly concerned with *first sales*. Furthermore, even in that context, the Commission was careful to limit the application of Order No. 94-A to those cases in which first purchasers were contractually bound to pay the deferred costs.

> As a general matter, the final rules will not operate to authorize the collection of amounts for production-related costs incurred prior to today. A basic principle of administrative procedure is that rules should operate prospectively only. We see no reason to depart from this principle in implementing these amendments. To the contrary, there is good reason to adhere to it.

48 Fed.Reg. at 5,161. In a footnote to the above-quoted section, the Commission stated:

> An exception is made in the case of delivery or compression services. However, this exception is based upon the Commission's notice in Order No. 94 that these costs could be recovered. In addition, this recovery is under particular safeguards to insure that amounts collected for these services may only be collected *if contractual authority existed to collect them at the time they were incurred.*

Id. at n. 89 (emphasis added); *see* 18 C.F.R. § 271.1104 (c)(4)(ii). It is thus clear that the notice provided by the two orders was limited to a highly restricted audience.

Furthermore, contrary to what the Commission suggests, Brief for Commission at 16 n. 10, notice may not be imputed as a result of the "passthrough" provision in section 601 of the NGPA, 15 U.S.C. § 3431(c). While section 601 permits a pipeline to recover any amount paid for natural gas that "is deemed to be just and reasonable for purposes of sections 4 and 5 of [the NGA]," *id.* § 3431(c)(2)(A), we read nothing in the language of the section to warrant a resort to retroactive as opposed to prospective rate increases.

We need not address whether the Commission might have accomplished the goal of permitting pipelines to pass these costs on to their customers (in proportion to their takes in the three-year period following Order No. 94) through a system of specific PGA clauses for each account because that issue is not before us. *See* Brief for Commission at 20. Such a device, in any event, would differ significantly from that selected by the Commission, as it would allow all surcharged customers to plan accordingly and would enable those with access to more than one pipeline to respond to the surcharges by reducing purchases from the pipeline(s) imposing the highest

additional costs. Nor need we determine whether the Commission, in order to avoid unjust enrichment, might "have ordered pipelines to begin collecting production-related cost surcharges at the time of issuance of Order No. 94, subject to adjustment when Order No. 94-A specified the exact production-related cost allowances." Joint Brief for Intervenor Pipelines at 22 (citing *Kansas Cities v. FERC*, 723 F.2d 82, 93 (D.C.Cir.1983)). As none of the parties has demonstrated that proper notice was afforded to pipeline customers that they might be subject to a surcharge on past purchases, we decline to address this hypothetical issue.

B. *Prior FERC Precedent*

Columbia Gas argues also that the Commission's decision to permit direct billing for deferred expenses is inconsistent with prior Commission opinions, orders, and regulations, and that the Commission failed to provide an adequate explanation of why it departed from its prior rulings. Because we hold the Commission acted beyond its authority in approving the direct billing of deferred costs, we need not decide whether its explanation of its alleged departure from past practice was sufficiently reasonable.

C. *The Interest Decision*

Transco argues that it is being penalized in the amount of almost a million dollars by the FERC order allowing direct billing because it is required to pay customers a higher rate of interest on amounts it is required to refund from past PGA clause collections than it is allowed to charge those same customers on their shares of directly billed deferred costs. Because we find the FERC orders allowing direct billing to be *ultra vires*, the question of the interest differential is moot. Accordingly, we deny the Commission's November 24, 1986 motion to remand that issue for further consideration.

III. CONCLUSION

The five orders on review violate the NGA's prohibition against retroactive ratemaking. We therefore strike the orders authorizing direct billing and remand to the Commission for further proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-1846, 85-1847, 86-1021, 86-1074,
86-1082, 86-1164 and 86-1187

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

April 22, 1988

Catherine C. Cook, Gen. Counsel, Jerome M. Feit, Sol., and John H. Conway, Atty., F.E.R.C. ("FERC"), Washington, D.C., were on respondent's petition for rehearing and suggestion for rehearing en banc and FERC's supplemental brief in response to court's February 23, 1988 order.

Raymond N. Shibley and Marlene L. Stein, Washington, D.C., were on the petition for rehearing and suggestion for rehearing en banc, for intervenors Panhandle Eatsern Pipe Line Co. and Trunkline Gas Co. and intervenors' memorandum brief in response to court's order.

Thomas F. Ryan, Jr., Robert G. Hardy, and Michael J. Fremuth, Washington, D.C., for Transcontinental Gas Pipe Line Corp., and William Douglas Field, Jr., Owensboro, Ky., for Texas Gas Transmission Corp., were on the petition for rehearing and suggestion for rehearing en banc and the pipelines' joint supplemental brief in response to court's order.

Richard L. Gottlieb, Giles D.H. Snyder, and S.J. Small, Charleston, W.Va., were on the supplemental brief, for petitioner Columbia Gas Transmission Corp.

Charles F. Wheatley, Jr., Annapolis, Md., and Philip B. Malter, Washington, D.C., were on the brief in response to court's order for Municipal Defense Group.

Before BUCKLEY and WILLIAMS, Circuit Judges, and GESELL,* U.S. District Judge for the District of Columbia.

Opinion PER CURIAM.

ON PETITIONS FOR REHEARING

PER CURIAM:

The Federal Energy Regulatory Commission ("FERC") and various intervenor pipelines have petitioned this court for a rehearing of *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C.Cir.1987). They assert that our decision notwithstanding, FERC has the implied authority under section 4(d) to waive the "filed rate" doctrine. 15 U.S.C. § 717c(d), *see generally City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C.Cir.1979). Because the issue had not been argued on appeal, we directed the parties to submit supplemental briefs addressing the following question:

> Can the court properly consider and decide, at this time, the question of waiver of the "filed rate doctrine," the issue not having been explicitly raised and fully briefed by the parties previously?

Order of Feb. 23, 1988.

In its supplemental brief, FERC asserts that the section 4(d) waiver issue "crystallized" only after this court concluded that ratepayers had been provided with "inadequate notice to warrant lawful retroactive ratemaking."

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Supplemental Brief for Respondent at 6. Accordingly, the Commission urges that we exercise our authority to consider the issue on rehearing in light of the impact of our decision on the public interest, citing *Consumers Union v. FPC*, 510 F.2d 656, 661-62 (D.C.Cir.1974). Supplemental Brief for Respondent at 6-7.

In *Consumers Union*, we noted our authority to consider arguments on rehearing that were not raised in the briefs or oral argument. "Our willingness to [entertain new arguments] rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of particular weight when the decision affects the broad public interest." *Id.* at 662.

In view of the magnitude of the costs at issue in this case, we are persuaded that we can best serve that interest by leaving our remand order in place and affirming that FERC is free to consider the waiver issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinion in this case.

So ordered.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP85-148-000,* TA85-3-29-000
and TA85-3-29-002

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, REJECTING COMPLIANCE TARIFF FILING AND RELATED MOTION AS MOOT, AND GRANTING WAIVERS

(Issued August 15, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order, we grant, with certain conditions, a petition filed on May 22, 1985, by Transcontinental Gas Pipe Line Corporation (Transco) to institute a special procedure to directly bill its customers for about $127 million in "retroactive" production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. Ac-

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* Not consolidated.

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

cording to Transco, they relate to natural gas that Transco purchased in NGPA first sales during the period July 25, 1980, through August 31, 1984. Transco proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed during that period and then to directly bill these amounts in twelve roughly equal monthly installments. The customers would also have the option to make a single lump-sum payment. This procedure would replace Transco's present purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates.

In this order, we also reject as moot certain tariff sheets Transco filed on May 31, 1985, in purported compliance with our April 30, 1985 PGA suspension order issued in Docket No. TA85-3-29-000, *et al.*[3] The proposed tariff sheets would have implemented recovery of a portion of these production-related cost allowances through the existing PGA provisions of Transco's tariff. In addition, we will direct that Transco provide a more detailed explanation of its gas purchasing programs in order to comply with Ordering Paragraph (C) of our April 30th order.

Interventions and Protests

Public notice of Transco's petition was issued in Docket No. RP85-148-000 on May 28, 1985, providing for protests, motions, or notices to intervene to be filed on or before June 6, 1985. The persons listed in Appendix A to this order filed timely motions or notices to intervene in Docket No. RP85-148-000. In addition, notice of Transco's May 30, 1985 compliance filing in Docket No.

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[3] *Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985). On May 30, 1985, Transco also filed a motion for clarification of Ordering Paragraph (C) of our April 30th order and a request for stay of the effectiveness of its revised tariff sheets filed May 31, 1985 in Docket No. TA85-2-29-002. We will also reject that motion in this order.

TA85-3-29-002 was issued on June 5, 1985, providing for protests, motions, or notices to intervene to be filed on or before June 12, 1985. Appendix B lists persons who filed timely motions or notices to intervene in Docket No. TA85-3-29-002. Pursuant to Rule 214 [4] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in the appendices are also granted in accordance with the conditions of Rule 214.

Five persons filed motions to intervene out of time in Docket No. RP85-148-000: Piedmont Natural Gas Company (Piedmont), Conoco, Inc. (Conoco), Long Island Lighting Company (Long Island), Elizabethtown Gas Company (Elizabethtown), and the Pennsylvania Public Utility Commission (Pennsylvania PUC). Long Island and Pennsylvania PUC each filed a motion to intervene out of time in Docket No. TA85-3-29-002.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, each of the late movants has established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting their requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

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[4] 18 C.F.R. § 385.214 (1984).

Ten persons filed protests or requests for hearing in Docket No. RP85-148-000: Public Advocate of New Jersey (Public Advocate), Brooklyn Union Gas Company (Brooklyn Union), South Jersey Gas Company (South Jersey), Washington Gas Light Company and Frederick Gas, Inc. (jointly, WGL), Columbia Gas Transmission Corporation (Columbia), Public Service Electric and Gas Company (PSE&G), North Carolina Natural Gas Corporation (NCNG), and Piedmont. Public Advocate, WGL and PSE&G also filed protests in Docket No. TA85-3-29-002. Finally, on June 14, 1985, WGL filed an answer in opposition to Transco's motion for clarification and stay filed May 30, 1985 in Docket No. TA85-3-29-000, *et al.*

Transco's Direct Billing Proposal

According to Transco, its petition is part of a two-pronged effort to, first, clean up a large, outstanding liability for "retroactive" production-related cost allowances it owes its producer-suppliers and, second, recoup all of these payments from its customers without being inequitable or sending inaccurate price signals in the process. The first part involves verifying the accuracy of the invoiced allowances and then paying producer-suppliers the verified amounts.[5] The second part is a direct billing procedure whereby Transco will recoup these payments from its customers in twelve monthly installments rather than through the PGA.

Transco refers to the allowances that it intends to directly bill as "retroactive Order No. 94 payments" in

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[5] At this juncture, Transco reports that it has verified and already paid about $90 million in these allowances and that it expects the total to reach its estimate of $127.7 million. According to Transco, there may be differences between what is invoiced and what is the appropriate amount. It will only pay the amount it verifies. We will discuss this aspect of its proposal later in response to several of the protests, and only note here that the fact that such differences may result does not persuade us to reject the proposal.

order to distinguish them from "current" Order No. 94 payments that it has been paying.[6]

With regard to "current" payments, Transco has been using its PGA to pass the cost of the allowances it has actually paid through to its customers.[7] Now, because of the large liability still outstanding, and because of what Transco asserts are the "inequities and undesirable market distortions inherent in recovering retroactive Order No. 94 costs through PGA filings," it seeks to implement its proposed direct billing procedure. The company asserts that direct billing will be more equitable to its customers than PGA passthrough because it will be able to match the production-related costs incurred in prior periods with actual purchases of its customers during those same prior periods.

Transco notes that numerous customers on its system are now purchasing at much lower levels than during the period when the production-related costs were incurred. Therefore, according to Transco, those customers would be assessed substantially less than their equitable portion of cost responsibility related to those periods. Further,

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[6] Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶ 30,178 (1980); Order No. 94-A, *FERC Statutes and Regulations* ¶ 30,419 (1983); Interim Rule, Docket Nos. RM80-73-000 and RM80-74-000, *FERC Statutes and Regulations* ¶ 30,420 (1983); Order No. 94-B, *FERC Statutes and Regulations* ¶ 30,421 (1983); Order No. 94-C, *FERC Statutes and Regulations* ¶ 30,454 (1983); Order No. 94-D, 23 FERC ¶ 61,280 (1983); Order No. 333, Regulations Implementing Refund Procedures Under Subpart K of Part 271 for Production-Related Costs, Docket No. RM83-6-000, *FERC Statutes and Regulations* ¶ 30,494 (1983); Order No. 334, *FERC Statutes and Regulations* ¶ 30,495 (1983); Order No. 334-A, 25 FERC ¶ 61,445 (1983); Order No. 94-E, 25 FERC ¶ 61,458 (1983). Order Nos. 94-A through 94-D are currently pending on appeal *sub nom. Texas Eastern Transmission Corp. v. F.E.R.C., et al.*, No. 83-4390 (5th Cir.).

[7] *See, e.g., Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148 (1984).

Transco asserts that direct billing avoids the distortion in market signals that would result if it were to pass these amounts through its PGA and charge increased commodity rates to all of its customers.

Turning to the mechanics of its direct billing proposal, Transco proposes to calculate each customer's share of the retroactive allowances based on each customer's actual purchases during each month to which the retroactive allowances apply. Each customer's total amount due, plus interest, will then be billed and paid in equal installments over a twelve-month period, or paid in a single lump-sum payment at the customer's option. A portion of the total billings is still an estimate due to the fact that Transco is still verifying and paying a substantial portion of the allowances. The total, now estimated to be about $127.7 million, will be charged to a special subaccount at the time the direct billing begins. To the extent Transco pays an amount different than what it previously estimated, it will debit or credit the special subaccount, thereby modifying the remaining monthly billing amounts. At the end of the twelve-month period, Transco will transfer any remaining balances to its Account No. 191 and will reflect this amount in its next PGA.

Apart from the fact that Transco's $127.7 million figure presently includes projections, there are two other components of this figure that should be noted. First, this figure includes about $18.9 million in retroactive allowances Transco previously used to offset Btu refunds pursuant to Order No. 399-A.[8] The offset provision was subsequently vacated in *Interstate Natural Gas Association of America v. F.E.R.C., et al.*[9]

The second component consists of about $32.3 million of retroactive payments Transco already has recovered from its customers through its PGA as authorized in Docket

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[8] *FERC Statutes and Regulations* ¶ 30,612 (1984).

[9] 756 F.2d 166 (D.C. Cir. 1985).

Nos. TA84-2-29-002 [10] and TA85-1-29-000.[11] In order to treat its customers as if it had not previously passed through any of these retroactive allowances, Transco proposes to refund this $32.3 million amount plus interest to its customers and then, after reallocating these payments in accordance with the matching principle of its proposal, directly billing these amounts as if they had not previously been recovered. Transco proposes to refund this amount within 15 days of the date of Commission approval of its petition.

Discussion

Based on our review of Transco's proposal we believe that it should be approved as conditioned below. It is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Above all, it will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility.

We are mindful of the adverse reaction of the protesters and certain other intervenors who seek rejection or at least a hearing on the proposal. To the extent appropriate, we will condition our authorization to meet the various legitimate concerns of these parties.[12] However, the balance of the objections are without merit and do not persuade us that the proposal should not be implemented immediately.

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[10] *Transcontinental Gas Pipe Line Corp.*, 27 FERC ¶ 61,227 (1984).

[11] *Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148 (1984).

[12] Our conditions relate to clarifying the procedures used, particularly interest calculations, ensuring clear and timely reporting, and requiring back-up data if not previously filed.

Several protesters argue that Transco's proposal is premature because the amounts to be billed are still uncertain and subject to change for various reasons. For example, several assert that Transco's proposal is premature because of the pending appeal of Order Nos. 94 through 94-D in the Fifth Circuit Court of Appeals.[13] WGL asserts that a decision by the court could render Transco's proposed charges uncollectible. Public Advocate urges that we require Transco to hold in escrow all amounts collected from its customers by direct billing pending the outcome of the Court of Appeals litigation.

Despite the fact that these orders have been challenged in court, section 271.1104 of our regulations promulgated by those orders is effective and authorizes Transco's first seller suppliers to charge and collect the subject production-related cost allowances from Transco.[14] We only address the procedures that Transco proposes to use to collect from its own customers. As we stated above, we believe those procedures are equitable.

Certain parties argue that the proposal also is premature because the accuracy of the allowances that Transco will directly bill is still at issue. South Jersey and Public Advocate note that Associated Gas Distributors (AGD) filed a blanket protest in Docket No. GP85-4-000 to the production-related cost "blanket affidavits" [15] filed

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[13] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390. Oral argument was held March 8, 1985.

[14] Because of section 271.1104(e)(3) requirements regarding the time to collect the retroactive allowances, i.e., by December 31, 1984, there may be cases where a waiver of that provision may be needed. We note that on September 7, 1984, Transco filed a petition for waiver of section 271.1104(e)(3) in Docket No. GP84-53-000. We shall deal with that petition by separate order.

[15] *See* 18 C.F.R. § 154.94(k) (1984). These blanket affidavits are only required with respect to first sales of gas still subject to the Natural Gas Act. Accordingly, AGD's protest does not relate to many of the production-related cost allowances at issue here.

by every company selling gas to Transco. In that protest, which is pending before the Commission, AGD requested a hearing regarding all of the production-related cost allowances covered by the protested blanket affidavits. South Jersey asserts that, among other things, the AGD protest raises the question of whether Transco's suppliers had contractual authority to collect these allowances. Brooklyn Union asserts that there is a material discrepancy between Transco's $127.7 million estimates of retroactive costs and the amounts it has previously identified in its previous PGA filings. Accordingly, Brooklyn Union requests that we not approve the direct billing proposal at this time and instead set for hearing the issue of whether Transco's payments of the retroactive allowances were properly computed and contractually authorized. Further, it urges that any direct billing procedure that we eventually adopt should be applicable only to the recovery of Transco's actual cash payments and not estimates.

We recognize the concerns of these parties, but we again emphasize that we are only approving a billing procedure. Our action here does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure, and any amounts so paid and collected are subject to refund.[16] Further, we will adopt Brooklyn Union's suggestion that Transco only be permitted to directly bill for its actual cash payments to allay Brooklyn Union's concerns that billed amounts may recover estimated but as yet unpaid liabilities. Because Transco only pays what it believes is lawful under § 271.1104, this will mean that only those actual cash payments, on which both the first seller and

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[16] All of Transco's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Transco pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

Transco agree, will be collected through direct billing. That is consistent with the self-implementing feature of our production-related cost rules.[17] Any amounts in dispute between Transco and its suppliers are automatically excluded from the direct billing procedure. Disputes as to the amounts that are directly billed can be raised before the Production-Related Costs Board.[18]

Several protesters expressed concern that they may not be permitted to passthrough the directly billed amounts at the state level. For example, WGL asserts that Transco's customers may experience a lag of up to two years before recovering these billed costs through their local rates, or, alternatively, the state regulatory agencies may disallow the costs as premature. South Jersey seeks a delay in implementing direct billing until November 1, 1985, to coincide with its state-approved PGA-type procedures. Public Advocate argues that the proposal is grounded on what may be an incorrect assumption that distributors will attempt to match these amounts with their own customer's actual purchases just as Transco has done. If that is not the case, then, it argues, these billed amounts can be avoided by interruptible customers thereby shifting an unfair share of these costs to firm customers. All of these concerns relate to potential problems at the state and local level after billings are paid by Transco's customers and are more appropriately to be considered and resolved by the state or local regulatory agency.

Public Advocate further argues that since the production-related cost allowances to be directly billed are

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[17] We note that our rules contemplate a self-implementing procedure whereby the purchaser is primarily responsible for policing the accuracy of production-related cost allowances it is billed by its first seller suppliers. *See* Order No. 94-C, *FERC Statutes and Regulations* ¶ 30,454, at pp. 30,472-73 (1983). Transco's ongoing process of verifying the amounts it is invoiced is in accord with these self-implementing procedures.

[18] See 18 C.F.R. § 271.1105 (1984).

purchased gas costs, they should be included in Transco's commodity costs and therefore subject to renegotiation to make Transco's gas more marketable. By directly billing these costs, Public Advocate asserts that the producers and Transco will continue to collect what Public Advocate believes is an excessive current cost of gas plus the retroactive allowances in the form of a demand-type charge. It argues that this would eliminate the incentive for the producers to give up on the collection of these allowances. Public Advocate asserts that the producers should be given the clear signal that the market place will not withstand the collection of the retroactive payments through any means and that they should renegotiate their contracts accordingly. We have reviewed the proposal and determined that the direct billing approach applied to the costs at issue here is equitable. This approach imposes the cost responsibility on the customers who bought the gas with which the section 110 payments are associated.

Several protesters argue that the proposal involves retroactive ratemaking. While Philadelphia Gas Works (PGW) charges that all collections would be suspect, PSE&G focuses only on the $32.3 million that Transco previously collected through its PGA but now intends to refund and then directly bill. PSE&G argues that the $32.3 million should not be refunded and then directly billed. These objections are without merit and, in effect, constitute a collateral attack on Order No. 94-A, *et al.* Order No. 94-A expressly authorized the collection of retroactively effective allowances which, to the extent directly billed now, are a cost to those customers. Moreover, authorizing a refund and subsequent direct billing of the $32.3 million already charged is not retroactive ratemaking. All amounts Transco previously collected in its PGA proceedings were collected subject to refund. To the extent we approve a direct billing of that $32.3 million amount (which is a prospective action), a refund is appropriate and is authorized by our prior PGA suspension orders to avoid a double-collection.

Columbia argues that Transco's direct billing proposal is similar to one that we rejected in *Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 (1984). Columbia's argument is incorrect. Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission found that Tennessee had not shown good cause to waive the Commission's PGA rules, particularly section 154.38 (d) (4) (iv) (*d*). The Commission expressed its concern over the uncertainty of what Tennessee meant by an "extroardinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered purchased gas costs.[19] Here, Transco's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. However, to be consistent with our discussion in *Tennessee*, we will condition our approval to require that, should Transco be obligated to refund any retroactive payments to its customers following the close of the direct billing period, it must directly pay the refunds in lump sum payments.

Miscellaneous Matters

Regarding interest, Transco only states that interest will be calculated "in all cases in accordance with the Commission's PGA regulations." To allay concerns regarding the ambiguity of Transco's interest computations, we will direct that, first, as to any production-related cost allowance payments that Transco paid but has not previously recouped, interest shall be computed for purposes of direct billing in accordance with section 154.38(d) (4) (iv) (*c*) of the Commission's rules. Second, as to the refund of the $32.3 million in previously collected amounts, interest shall be calculated in accordance with section 154.67(c) (2), 18 C.F.R. § 154.67(c) (2) (1984). This second requirement is to clarify that the

[19] 29 FERC ¶ 61,150, at p. 61,329.

interest Transco will owe on the $32.3 million refund amount cannot be reduced by the application of principles of interperiod tax allocation that would have applied had we authorized interest to be calculated in accordance with our PGA regulations as Transco requested.[20]

Several of the protesters assert that Transco's proposal is deficient insofar as it fails to include proposed revised tariff sheets. Furthermore, and consistent with their view that tariff sheets are required, these parties assert that any such filing should be suspended for the full 5-month statutory period under section 4(e) of the Natural Gas Act.[21]

While we agree that the amounts to be directly billed do constitute part of Transco's "rates" to its customers, this proposal does not require submission of tariff sheets. Any such sheets would necessarily change each month and would consist of a listing, company-by-company, of the actual amounts billed. That is information which we will obtain by report. As to the technical requirements of the Natural Gas Act requiring the filing of changes in tariffs, the original gas costs to which these section 110 payments apply were reflected on tariff sheets. Here, we are permitting retroactive change in those costs as permitted by the NGA and our regulations.[22] All billings will be subject to refund and may be protested at the close of the twelve-month billing period after each customer's final total billing is known. To the extent waivers of our rules are required to effect this billing procedure in this manner, they are granted for good cause shown.

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[20] *See* 18 C.F.R. § 154.38(d)(4)(iv)(*b*) (1984).

[21] 15 U.S.C. § 717c(e).

[22] We note that we likewise did not require revised tariff sheets in the case of a similar direct billing proposal by Natural Gas Pipeline Company that we approved by letter order issued January 29, 1985. *See, Natural Gas Pipeline Co.*, 30 FERC ¶ 61,138 (1985).

Finally, we shall require Transco to file a report within 30 days of the end of the 12-month billing period detailing its actual billings and the disposition of remaining balances. Further, we will require that Transco file a refund report regarding its dispersal of the $32.3 million in refunds within 15 days after it makes those dispersals. We shall also require Transco to submit, within 15 days of each monthly billing, the information required by section 271.1104(f) and contract provisions necessary to verify the accuracy of its retroactive allowance payments.

Transco's Compliance Filing in Docket No. TA85-3-29-000

As we noted at the outset of this order, Transco filed certain tariff sheets that would have reflected PGA treatment of some of the same retroactive production-related cost allowance payments we are allowing it to directly bill. On May 31, 1985, Transco filed proposed revised tariff sheets in order to comply with Ordering Paragraph (C) of our PGA suspension order issued in Docket No. TA85-3-29-000 on April 30, 1985.[23] In that order, we rejected Transco's filed tariff sheets that reflected the elimination of recovery of retroactive production-related cost allowances and ordered Transco to include sufficient production-related costs to balance the amounts passed through to its winter customers in its last PGA in Docket No. TA85-1-29-000.[24] At the time we issued that order, Transco had yet to file its direct billing proposal. Now that we have its proposal before us, Transco's revised tariff sheets are no longer appropriate, and as such, we shall reject them as moot. In addition, and for the same reason, we shall reject as moot a motion Transco filed May 30, 1985, in Docket No. TA-85-3-29-000 requesting clarification of Ordering Paragraph (C) of our April 30,

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[23] *Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985).

[24] *Id.* at pp. 61,265-65.

1985 order and stay of the effectiveness of the revised tariff sheets filed on June 5, 1985. Except as provided below, we therefore will not discuss any of the objections made to Transco's compliance filing in the protests and answers filed in response.

In its June 12, 1985 protest in Docket No. TA85-3-29-000, *et al.*, Public Advocate asserts that, in its compliance filing of May 31, 1985, Transco failed to provide the information regarding Transco's Market Retention Program and Market Maintenance Program (MRP and MMP, respectively) as ordered in our April 30th suspension order.[25] Upon review of Transco's compliance filing we find that, for the reasons set forth in Public Advocate's protest, Transco's response is deficient and not in compliance with our order. Accordingly, we shall order Transco to fully comply with Ordering Paragraph (C) of our April 30, 1985 order regarding its MRP and MMP within 30 days of this order. Finally, in an answer to Transco's motion for clarification and stay, WGL argues that Transco failed to provide information regarding Order 94-A costs it expects to pay during the current PGA period as directed by that order. In light of our action today, we will no longer require Transco to file that information and will modify our April 30th order accordingly.

The Commission orders:

(A) Transco's petition for direct billing filed in Docket No. RP85-148-000 on May 22, 1985, is granted and its direct billing procedure is made effective as of the date of issuance of this order subject to the conditions set forth below.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Transco to implement its direct billing proposal as conditioned in this order.

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[25] *Id.* at p. 61,266.

(C) Transco is permitted to implement the direct billing procedures described more fully in the text above and in its petition, subject to the following conditions:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Transco shall include in its monthly billings to its customers only amounts it has actually paid prior to the issuance of each such monthly billing.

(2) Transco shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38 (d) (4) (iv) (*c*) (1984) and section 22.7 of the General Terms and Conditions of Transco's FERC Gas Tariff, Second Revised Volume No. 1.

(3) Within 15 days of the date of this order, Transco shall directly refund, by lump-sum payments, $32,303,982.00 to its customers consistent with the discussion in the text above, plus interest thereon computed in accordance with 18 C.F.R. § 154.67(c) (2) (1984), and, within 15 days of the dispersal of such refunds, Transco shall file a report with the Commission detailing the amounts refunded to each customer, and showing the basis for each such amount and the date paid.

(4) Within 30 days of the end of the twelve-month billing period, Transco shall file a report that details: (a) Transco's actual monthly billings identified on a company-by-company basis and (b) the amount and disposition of any remaining balance in its special subaccount.

(5) Within 15 days of each monthly billing, Transco shall file: (a) the information required under 18 C.F.R. § 271.1104(f), and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information or contracts have not previously been filed with the Commission.

(6) Within 30 days of the date of this order, Transco shall file all information regarding its MRP and MMP required by Ordering Paragraph (C) of the Commission's order issued April 30, 1985 in Docket No. TA85-3-29-000, *et al.*, including: (a) a detailed explanation of each such response (b) supporting information and data, (c) any other information necessary to fully respond to the deficiencies raised in the protest by Public Advocate filed on June 12, 1985, in Docket No. TA85-3-29-000, *et al.*

(D) Transco's Substitute Thirty-Fifth Revised Sheet Nos. 12 and 15 and Substitute First Revised Sheet No. 15-A to its FERC Gas Tariff, Second Revised Volume No. 1, are rejected as moot.

(E) Transco's Motion for Clarification and Stay filed May 30, 1985, in Docket No. TA85-3-29-000, *et al.* is rejected as moot.

(F) Ordering Paragraph (C) of the Commission's order issued April 30, 1985, in Docket No. TA85-3-29-000, *et al.*, 31 FERC ¶ 61,129, is modified to eliminate the requirement of filing information and revised tariff sheets regarding Order No. 94-A costs.

(G) The late motions to intervene filed by Piedmont, Conoco, Long Island, Elizabethtown, and Pennsylvania PUC are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

APPENDIX A

Motions to Intervene: Docket No. RP85-148-000

The Public Advocate of New Jersey [1]
The Brooklyn Union Gas Company [2]
South Jersey Gas Company [2]
Washington Gas Light Company and Frederick Gas Company, Inc.[1]
Columbia Gas Transmission Corporation [1]
Public Service Electric and Gas Company [2]
Philadelphia Gas Works
South Carolina Pipeline Corporation
Consolidated Edison Company of New York, Inc.
Allied Corporation
Atlanta Gas Light Corporation
Arco Oil and Gas Corporation
National Fuel Gas Supply Corporation
Consolidated Gas Transmission Corporation
Southern Natural Gas Company
Texas Eastern Transmission Corporation
North Carolina Natural Gas Corporation and Public Service Company of North Carolina, Inc.[1]
Pennsylvania Gas and Water Company
UGI Corporation
Philadelphia Electric Company
Commonwealth Gas Pipeline Corporation
Delmarva Power and Light Company
North Penn Gas Company
Owens-Corning Fiberglas Corporation
The Public Service Commission of the State of New York

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[1] Also filed a protest.

[2] Requested hearing.

APPENDIX B

Motions to Intervene: Docket No. TA85-3-29-002

Public Advocate of New Jersey [1]

Texas Eastern Transmission Corporation

Brooklyn Union Gas Company

Consolidated Edison Company of New York, Inc.

Public Service Electric and Gas Company [2]

National Fuel Gas Supply Corporation

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[1] Also filed a protest.

[2] Request hearing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-170-000

TEXAS EASTERN TRANSMISSION CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVERS

(Issued September 30, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order we grant, with certain conditions, a petition which Texas Eastern Transmission Corporation (Tetco) filed on July 3, 1985, proposing that it be permitted to bill its customers directly for approximately $74 million (plus interest) in retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers.[1] These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104[3] of the Commission's NGPA rules. According to Tetco, they relate to natural gas that Tetco purchased during the period July 25, 1980 through April 30, 1985. Tetco proposes to allocate these costs to those of its customers who actually benefited from the production-related services

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[1] Tetco will collect interest pursuant to the Commission's PGA Regulations, 18 C.F.R. § 154.38(d).

[2] 15 U.S.C. § 3320(a)(2)..

[3] 18 C.F.R. § 271.1104 (1984).

performed during that period and then to directly bill these amounts in twelve monthly installments. The customers would have the option to make a single lump-sum payment. Tetco's direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting gas costs attributable to past periods from Tetco's current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA of 1978 (Docket No. RM79-3, issued December 1, 1978). [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances

for compression and gathering costs which would be effective as of the date of issuance of Order No. 94.[4]

Tetco has already paid, and will pay producers a substantial amount for Order No. 94 costs that were incurred during the Commission defined retroactive period, as well as retroactive amounts related to the period March 7, 1983, through April 30, 1985.

Interventions

The Commission issued notice of Tetco's petition on July 12, 1985, with motions to intervene or protests due July 22, 1985. The persons listed in the Appendix to this order filed motions or notices to intervene. Four of the motions to intervene were filed late.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties that might result from permitting the intervention; (4) the motion

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[4] On January 24, 1983, the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419, 30,421], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-002 and RM80-47-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for "production-related" costs are set out in the Commission's Rules and Regulations, section 271.1104. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. 271.1104(e).

conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, each of the late movants has established an interest in this proceeding. At this stage of the proceeding, other parties will not be prejudiced by granting their requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

Four interveners protested Tetco's petition: Columbia Gas Transmission Corporation, Municipal Defense Group, Philadelphia Gas Works and the Algonquin Customer Group. Two interveners requested that the Commission set this matter for hearing: New Jersey Natural Gas Company and National Gas and Oil Company. The protesters and New Jersey Natural Gas company raise no issues which were not previously addressed by the Commission in orders approving direct billing proposals by Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company;[5] their arguments therefore will not be specifically addressed herein.

Protests

National Gas and Oil Company (NGO) asserts that Tetco's billing allocation is incorrect. NGO claims that its bill is partially based on volumes NGO had transferred to other of Tetco's DCQ customers and that Tetco's proposal would result in an overcharge to NGO of $606,756.39. The Commission will direct that Tetco file within 15 days of the issuance Commission's order either: (1) a response to the allegations of NGO, or (2) an appropriately revised billing allocation if the concerns raised by NGO are correct. This compliance filing will provide NGO with a forum to continue to take issue with Tetco's direct billing proposal, if necessary.

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[5] *See* 32 FERC ¶ 61,230 mimeo, at 6-11; 31 FERC ¶ 61,308, at p. 61,695 (1985).

Associated Natural Gas Company (ANG) filed comments objecting to Tetco's proposal. ANG lost a major segment of its distribution system December 1, 1984 [6] and is concerned that Tetco's proposal will result in a substantial rate increase to customers other than those who actually incurred the subject costs. ANG's estimated total bill is $506,496.10; the Commission staff estimates that about $55,000 of this relates to ANG's lost load.[7] While the Commission recognizes ANG's problem, this is an issue which is appropriately addressed at the state level; since it concerns sales not for resale, it is not subject to Commission determination.

Discussion

Tetco's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals the Commission has approved in two previous instances.[8] The Commission agrees, however, with those protesters who argue that Tetco should not include estimated amounts in its billing. It is appropriate, nonetheless, to use estimates to calculate the total amount upon which the twelve monthly bills are based in order to avoid progressively larger bills as payments to producers are actually made. Limiting Tetco's collection of retroactive Order No. 94 amounts to the levels it has actually paid at the time of the monthly billing will also provide Tetco with an incentive to process outstanding production-related cost invoices so they can be included in monthly bills. We will, therefore, approve TETCO's proposal, subject to appropriate conditions, and grant the necessary

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[6] The distribution system was operated by ANG until November 30, 1984, when the City of Kennett, Missouri acquired it. Kennett now buys gas directly from Tetco. The necessary abandonments and certificates were issued in Docket Nos. CP83-300 and CP83-301.

[7] Based on ANG's release to Kennett of 10.811 percent of ANG's purchases from Tetco pursuant to the noted dockets. ANG's operation of the Kennett distribution system is non-jurisdictional.

[8] *See* footnote 5, *supra*, and accompanying text.

waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund.[9]

The Commission orders:

(A) Tetco's petition for direct billing filed in Docket No. RP85-17-000 on July 3, 1985, is granted, and its direct billing procedure is made effective as of October 1, 1985, subject to the conditions set forth below:

(1) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(2) While Tetco may initially base its twelve monthly billings to its customers on the total retroactive Order No. 94 payments (both estimated and actual), it may include in its monthly bills to customers only amounts it has actually paid prior to the issuance of each monthly billing;

(3) Tetco is directed to file within 15 days a response to NGO's allegations concerning its direct billing allocation, or a revised direct billing principal allocation consistent with NGO's concerns;

(4) Tetco is required to file a report, within 30 days of the end of the 12-month billing period, that details Tetco's actual monthly billings by customer, and the disposition of any remaining amounts; and

(5) Tetco is required to file, within 15 days of each monthly billing, (a) the information required under sec-

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[9] All of Tetco's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Tetco pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

tion 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information has not been previously filed at the Commission;

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Tetco to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by National Gas and Oil Company, Long Island Lighting Company, Texas Gas Transmission Corporation, and Peoples Natural Gas Company, are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) The petitions for hearing are denied.

APPENDIX

Motions to Intervene

1. Columbia Gas Transmission Corporation [1]
2. Municipal Defense Group [1]
3. Philadelphia Gas Works [1]
4. The Algonquin Customer Group [1]
5. New Jersey Natural Gas Company [2]
6. Associated Natural Gas Company
7. Consolidated Edison Co. of New York, Inc.
8. Equitable Gas Company
9. Arkla Energy Resources
10. Public Service Electric and Gas Company
11. Union Electric Company
12. Consolidated Gas Transmission Corporation
13. The Process Gas Consumers Group
14. Central Illinois Public Service Company
15. Niagara Mohawk Power Corporation
16. Algonquin Gas Transmission Company
17. Elizabethtown Gas Company
18. Philadelphia Electric Company
19. Brooklyn Union Gas Company
20. Transcontinental Gas Pipe Line Corporation
21. National Gas and Oil Company [2] [3]
22. Long Island Lighting Company [3]
23. Texas Gas Transmission Corporation [3]
24. The Peoples Natural Gas Company [3]

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[1] Also filed protest.

[2] Requested hearing.

[3] Late-filed motion to intervene.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-181-000

TEXAS GAS TRANSMISSION CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVER

(Issued October 16, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order we grant, with certain conditions, a petition which Texas Gas Transmission Corporation (Texas Gas) filed on August 7, 1985, proposing that the Commission permit it to bill its customers directly for retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. According to Texas Gas, they relate to natural gas that Texas Gas purchased during the period August 1, 1980, through December 31, 1984 (the "retroactive period").

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[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

Texas Gas proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed, and then to bill these amounts directly to the customers. Texas Gas' direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting gas costs attributable to past periods from Texas Gas' current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the NGPA, the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA (Docket No. RM79-3, issued November 29, 1978) [*FERC Statutes and Regulations* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances for compression and gathering costs which

would be effective as of the date of issuance of Order No. 94.[3]

Texas Gas reviewed and verified a significant portion of the Order No. 94 costs incurred during the retroactive period and claimed by its producer-suppliers. Texas Gas offset these amounts (approximately $48.8 million) against a corresponding amount of Btu refunds owed to Texas Gas by the corresponding producers pursuant to Order No. 399-A [*FERC Statutes and Regulations* ¶ 30,612].[4] Since that time the offset mechanism has been vacated by the Commission in its Order No. 399-B [*FERC Statutes and Regulations* ¶ 30,651]. Additionally, Texas Gas states that it anticipates that its pipeline suppliers will soon bill it for retroactive Order No. 94 costs.[5]

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[3] On January 24, 1983 [*FERC Statutes and Regulations* ¶ 30,420], the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations* ¶ 30,419 and ¶ 30,421], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-000 and RM80-74-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for production-related costs are set out in the Commission's rules and regulations, section 271.1104, *supra*. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. § 271.1104(e).

[4] Order No. 399-A was subsequently overturned on appeal. *Interstate Natural Gas Association v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir. 1985).

[5] The Commission has approved the petitions of two of Texas Gas' pipeline suppliers to collect retroactive Order No. 94 amounts by direct billing. *See Tennessee Gas Pipeline Co.*, 31 FERC ¶ 61,308 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493 (September 30, 1985).

The Proposed Direct Billing Mechanism

Texas Gas proposes, in order to implement its direct billing procedure, to calculate each customer's proportionate share of Order No. 94 costs during the retroactive period as compared to the total of all purchases by all customers on the system during the period. Texas Gas proposes next to compute the Btu refunds owed to each customer in accordance with the procedures specified in the Commission's Order No. 399.

Once Texas Gas has established the customer's Order No. 94 cost liability and its Btu refund, Texas Gas proposes to submit to the customers an invoice for the Order No. 94 costs and a credit memorandum reflecting the customer's Btu refund. The two statements are to be accompanied and reconciled by a payment from Texas Gas, if the customer's Btu refund exceeds its refund. In the latter case, to the extent that the customer's Order No. 94 costs exceed its Btu refund, the customer would have the option of paying this amount in one lump-sum payment, or in twelve monthly installments plus interest, computed in accordance with the Commission's PGA regulations. The twelve-month period would begin on the first day of the first month following Commission approval of this petition.

A new subaccount of Texas Gas' Account No. 191 would be created to include the Order No. 94 costs remaining which were not paid in a lump-sum payment. This new subaccount would be credited with the monthly payments received from the customers during the twelve-month period.

Motions to Intervene

Texas Gas' petition was noticed by the Commission on August 16, 1985, with comments due by August 23, 1985. Fourteen companies listed in the appendix filed timely motions to intervene. The Louisville Gas and Electric Co., Beckett Paper Company, and Indiana Gas Co. and

Ohio River Pipeline Corp. jointly, filed requests for leave to intervene out of time.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, the late movants have established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting the requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

Protests

Memphis Light, Gas and Water Division, City of Memphis, Tennessee (Memphis), protests in limited respects Texas Gas' petition. Specifically, Memphis' protest makes four recommendations: (a) that the Commission should expressly limit its approval to the billing procedure itself, and affirm that the amounts paid are subject to review and refund; (b) Texas Gas should only bill directly for its actual cash payments to first sellers; (c) Texas Gas should calculate interest for purposes of direct billing in accordance with Section 154.38(d)(4)(iv)(c) of the Commission's Regulations (interest provision of the PGA regulations); (d) Texas Gas should provide the Commission with schedules showing its calculations of Order No. 94 costs and individual customers' direct bill amounts. Memphis' recommendations have merit, and will be incorporated into the Commission's order.

Western Kentucky Gas Co. and Louisville Gas and Electric Co. expressed concern that Texas Gas' proposal might be considered as retroactive ratemaking. The Commission has found such concerns unwarranted in accepting an earlier proposal for direct billing.[6]

Columbia Gas Transmission Corp. (Columbia) states that its purchases from Texas Gas have declined since the retroactive period, and argues that as a consequence acceptance of Texas Gas' proposal will increase Columbia's gas costs by about $6.8 million. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals that would result if Texas Gas were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Further, these additional costs relate to prior period purchases of Columbia, and such costs should be borne by Columbia. If such costs were to remain in the PGA surcharge of Texas Gas different customers of Texas Gas would be required to bear such costs due to the changed customer purchase profile on Texas Gas' system.

The Public Service Commission of Commonwealth of Kentucky argues that production-related costs cannot be charged until the contractual entitlement of the producers thereto have finally been determined. Section 271.1104 of the Commission's regulations, however, authorizes Texas Gas' first seller suppliers to charge and collect the subject production-related cost allowances from Texas Gas. The Commission herein only addresses the procedures that Texas Gas proposes to use to collect from its own customers and not the costs themselves. Our acceptance of

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[6] *See Transcontinental Gas Pipe Line Corp.*, Docket No. RP85-148-000, *et al.*, 32 FERC ¶ 61,230 (1985).

Texas Gas' proposal does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; accordingly any amounts so paid and collected are subject to refund.[7]

Beckett Paper Company argues that the direct billing proposal unfairly singles out one class of customers. The Commission finds no merit in this argument. Texas Gas proposes to direct bill all of its jurisdictional customers, not a particular class, for their share of the retroactive Order No. 94 costs based on each customer's actual purchases of gas during the retroactive period as compared to all system purchases during that time.

Discussion

Texas Gas' proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission had approved in two previous instances, involving Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company.[8] Texas Gas' proposal, however, to offset against its direct bills for retroactive production-related costs its Btu refunds is inappropriate. As we noted above, the Commission has vacated its Btu refund offset program in Order No. 399-B.

We will accordingly deny Texas Gas' proposal to the extent that it would offset its Order No. 94 costs with Btu refunds. With this exception, we will approve Texas

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[7] All of Texas Gas' first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Texas Gas pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

[8] 32 FERC ¶ 61,230 (1985), and 31 FERC ¶ 61,380 (1985), respectively.

Gas' proposal, subject to appropriate conditions, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund. Further, any amounts in dispute between Texas Gas and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Texas Gas' petition for direct billing filed in Docket No. RP85-181-000 on August 1, 1985, is granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Texas Gas shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Texas Gas shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(*c*)(1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Texas Gas and its suppliers are excluded from the direct billing procedure;

(5) Texas Gas is required to file a report, within 30 days of the end of the 12-month billing period, that details Texas Gas' actual monthly billings by customer, and the disposition of any remaining amounts; and

(6) Texas Gas is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Texas Gas to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by Louisville Gas and Electric Company, Beckett Paper Company, and Indiana Gas Company and Ohio River Pipeline Corporation jointly, are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) The petition for hearing is denied.

APPENDIX

Motions to Intervene

Columbia Gas Transmission Corporation [1]

Memphis Light, Gas and Water Division, City of Memphis, Tennessee [2]

The Cincinnati Gas and Electric Company and Lawrenceberg Gas Transmission Corporation

The City of Hamilton, Ohio

The Peoples Natural Gas Company

Arkla Energy Resources

Niagara Mohawk Power Corporation

ANR Pipeline Company

Texas Eastern Transmission Corporation

Western Kentucky Gas Company [2] [4]

The Public Service Commission of The Commonwealth of Kentucky [1]

Consolidated Gas Transmission Corporation

Associated Natural Gas Company

Mobil Oil Exploration and Producing Southeast Inc.

Louisville Gas and Electric Company [3]

Beckett Paper Company [3]

Indiana Gas Company and Ohio River Pipeline Corporation [3]

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[1] Also filed a protest.

[2] Limited protest.

[3] Filed out of time.

[4] Request hearing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-202-000

TRUNKLINE GAS COMPANY

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVER

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By this order we grant, with certain conditions, a petition which Trunkline Gas Company (Trunkline) filed on September 23, 1985, proposing that the Commission permit it to bill its customers directly for retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. According to Trunkline, they relate to natural gas that Trunkline purchased during the period August 1, through February 28, 1985, (the "retroactive period").

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[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

Trunkline proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed, and then bill these amounts directly to the customers. Trunkline's direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting costs attributable to past periods from Trunkline's current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the NGPA, the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA (Docket No. RM79-3, issued December 1, 1978) [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances for

compression and gathering costs which would be effective as of the date of issuance of Order No. 94.[3]

Trunkline states that it has made or will make by September 30, 1985, payments on a retroactive basis for production-related costs incurred during the period from July 25, 1980 through February 28, 1985 (the retroactive period). Trunkline estimates that the retroactive amount owed to its suppliers is approximately $107.5 million. This figure includes amounts previously offset against producer Btu refunds under the offset mechanism established in the Commission's Order No. 399-A.[4] On appeal, the Commission's proposed offset mechanism was reversed.[5]

Trunkline has agreed to provide the necessary supporting detail for the amounts paid, including the information required by section 271.1104(f) of the Commission's regulations [6] and the relevant contract provisions, to the extent such information has not already been provided.

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[3] On January 24, 1983 [*FERC Statutes and Regulations* ¶ 30,420], the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations* ¶ 30,419], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-000 and RM80-74-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for production-related costs are set out in the Commission's rules and regulations, section 271.1104 *supra*. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. § 271.1104(e).

[4] 29 FERC ¶ 61,254 (1984) [*FERC Statutes and Regulations* ¶ 30,612].

[5] *Interstate Natural Gas Association of America v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir. 1985).

[6] 18 C.F.R. § 271.1104(f) (1984).

The Proposed Direct Billing Mechanism

Trunkline proposes, in order to implement its direct billing procedure, to calculate each customer's proportionate share of Order No. 94 costs during the retroactive period as compared to the total of all purchases by all customers on the system during the period.

Trunkline proposes to give its customers the option of making payment through a lump-sum amount or in monthly installments with interest over a twelve-month period commencing November 1, 1985 through October 31, 1986.

Trunkline also proposes to establish a separate subaccount of its Account No. 191 to be debited with payments made to producers and credited to reflect recovery of such amounts from Trunkline's customers. Trunkline proposes to debit or credit the special subaccount with the difference between any amount it pays and the estimated amounts included in this filing. Further, Trunkline proposes that any balance remaining in the subaccount at the end of the twelve-month installment billing period will be transferred to the appropriate current subaccount of Account No. 191 for inclusion in its subsequent PGA filing.

Trunkline's proposal to create a special subaccount has aroused concern among several of Trunkline's customers. This issue will be discussed, *infra*, in greater detail.

Interventions

Public notice of Trunkline's petition was issued on September 26, 1985, with comments due by October 4, 1985. The persons listed in Appendix A to this order filed timely motions or notices to intervene. Pursuant to Rule 214 [7] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of

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[7] 18 C.F.R. § 385.214 (1984).

the date such motion is filed. Any timely filed motions or notices not listed in the appendices are also granted in accordance with the conditions of Rule 214. Illinois Power Company (Illinois Power) filed a motion to intervene out of time.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In its motion, the late movant has established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting the request for intervention. Accordingly, the Commission finds that good cause exists to permit the late intervention.

Protests

Five persons filed protests in Docket No. RP85-202-000: Columbia Gas Transmission Corporation (Columbia), Consumers Power Company (Consumers Power), General Service Customer Group (GSC), Indiana Gas Company, Inc. (Indiana Gas), and Michigan Gas Utilities Company (MGU).

Columbia purchases gas from Panhandle Eastern Pipe Line Company (Panhandle) who, in turn, purchases gas from Trunkline. Columbia states that Trunkline's proposal in Docket No. RP85-202-000 may affect natural gas service to Columbia and the rates under which such service is rendered.

Columbia argues that Trunkline's proposal is similar to one we rejected in *Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 (1984). Columbia's argument is incorrect. Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission found that Tennessee had not shown good cause to waive the Commission's PGA rules, particularly section 154.38(d)(4)(iv)(*d*). The Commission expressed its concern over the uncertainty of what Tennessee meant by an "extraordinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered purchased gas costs. Here, Trunkline's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. However, to be consistent with our discussion in Tennessee, we will condition our approval to require that, should Trunkline be obligated to refund any retroactive payments to its customers following the close of the direct billing period, it must directly pay the refunds in lump sum payments. Columbia argues further that Trunkline's proposal is a departure from the Commission's rate treatment of deferred gas costs. To the contrary, as an equitable and practical method of allocating cost responsibility, the Commission has approved similar direct billing proposals in several instances.[8]

Columbia states that its purchases from Panhandle have declined since the retroactive period, and argues that as a consequence, Trunkline's proposal will increase Columbia's gas costs. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals

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[8] *See, e.g., Trancontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985); and *Consolidated Gas Transmission Corporation*, 32 FERC ¶ 61,448.

that would result if Trunkline were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Further, these additional costs relate to prior period purchases of Columbia, and such costs should be borne by Columbia. If such costs were to remain in the PGA surcharge of Trunkline, different customers of Trunkline would be required to bear such costs due to the changed customer purchase profile on Trunkline's system.

Consumers Power and GSC express concern regarding Trunkline's proposal to establish a special subaccount of Account No. 191, as discussed above.[9] Consumers Power argues that under such an arrangement, the risk of non-payment of the amounts billed by Trunkline would fall on Trunkline's present customers in proportion to their current purchases. Consumers Power argues further that the onus of enforcing payment against a non-paying customer should rest with Trunkline, not its paying customers.

GSC urges the Commission to condition acceptance of Trunkline's proposal so that any amounts charged, but not collected, from a particular customer may not ultimately rest upon other customers through the transfer of the special subaccount's balance at the end of 12 months to Trunkline's next effective PGA filing.

The Commission agrees that Trunkline should not be allowed to shift the risk of non-payment of Order 94 costs. To allay the concerns voiced by the protestants, we will condition our acceptance of Trunkline's proposal as follows. Trunkline is permitted to establish, for accounting purposes, a special subaccount of Account No. 191 to debit amounts of retroactive payments to producers, and to credit payments by customers. However, Trunkline will not be permitted to transfer any amounts from this

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[9] In a separate motion to intervene, MGU requests that Trunkline's petition be conditioned as set forth in GSC's motion to intervene.

special subaccount at the end of the 12 months to the next PGA period which relate to any non-payment of direct bills Trunkline has assessed any customer.

Additionally, GSC argues that a refund condition should be imposed for any costs charged to the proposed special Account 191 subaccount that may subsequently be reduced or eliminated for any reason. Our order states that production-related costs paid or collected as part of the direct billing procedure are subject to refund. The order does not permit amounts in dispute between Trunkline and its suppliers to be included in the direct billing procedure. We believe such conditions address the concern raised by GSC.

GSC requests that our order be conditioned upon the application of the settlement agreement approved in *Trunkline Gas Co.*, Docket No. RP83-93-000 (Phase I).[10] GSC believes the settlement restrains Trunkline's recovery of retroactive production-related costs by not permitting any production-related cost recovery, in excess of $2.57 per Mcf in gas costs, for amounts that were not authorized order contracts in effect on December 31, 1984.

Our action in Docket No. RP85-202-000 is consistent with the terms of the settlement and in no way conflicts with the Commission's decision in Docket No. RP83-93-000.

GSC has also requested that the supporting detail to be supplied by Trunkline, as well as the company's final report showing actual monthly billings to customers, be served upon GSC and all other parties to this proceeding. We agree that the final report submitted by Trunkline to the Commission should be served on all parties in this proceeding and we require Trunkline to do so. As to GSC's request for service of the supporting documenta-

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[10] The Commission approved the settlement agreement in an order issued October 25, 1985. 33 FERC ¶ 61,069 (1985).

tion, including the information required by section 271.1104(f) of the Commission's regulations,[11] we will not require Trunkline to supply such information to all parties. The Commission's regulations require Trunkline to file all supporting documentation with the Commission so that it may be available, at the Commission, to the public. Such supporting documentation is often voluminous and, for that reason, the Commission's practice has been to retain these materials at the Commission and permit the public to view them here.

Consumers Power expresses an additional concern regarding the inclusion of estimated amounts in Trunkline's proposal. We believe that this issue is fully addressed below in the ordering paragraphs wherein it is stated that Trunkline shall include only amounts it has actually paid prior to the issuance of each monthly billing.

Indiana Gas requests that the Commission specify in its order that Mississippi River Transmission Corporation (MRT) is responsible for paying the production-related costs shown in Appendix A to Trunkline's petition. During the retroactive period in issue here, MRT was a jurisdictional sales customer of Trunkline. Effective May 1, 1985, MRT cancelled its gas purchase contract with Trunkline, and is, at present, no longer a jurisdictional customer of Trunkline. Indiana Gas, as well as other protesters urges the Commission, in its order, to direct MRT to pay its allocable share of retroactive Order 94 payments.

We are mindful of the concerns expressed by Indiana Gas and other protesters. However, Indiana Gas' argument is premature. In its petition, Trunkline has listed, at Appendix A, those customers who will be billed for retroactive Order 94 costs and the amount allocable to each customer. MRT is listed among those customers included in Trunkline's direct billing procedure. Thus, we

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[11] 18 C.F.R. § 271.1104(f).

are not confronted with a situation where MRT has refused payment for costs billed by Trunkline. The interests of Indiana Gas and other customers are protected by our decision to not permit Trunkline to flow through its PGA any unpaid amounts that remain owing at the end of the 12-month period.

Discussion

Trunkline's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission has approved in previous instances. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985) and *Tennessee Gas Pipeline Co.*, 31 FERC ¶ 61,380 (1985). We remain cognizant of the concerns expressed by the protesters and other intervenors. We have conditioned our acceptance of Trunkline's petition, as appropriate, to meet the legitimate concerns of these parties.

With the conditions outlined below and discussed in the order, we will approve Trunkline's proposal, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund.[12] Further, any amounts in dispute between Trunkline and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Trunkline's petition for direct billing filed in Docket No. RP85-202-000 on September 23, 1985, is

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[12] All of Trunkline's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, amounts that Trunkline pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are not permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Trunkline shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Trunkline shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(*c*) (1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Trunkline and its suppliers are excluded from the direct billing procedure;

(5) Trunkline is required to file a report, within 30 days of the end of the 12-month billing period, that details Trunkline's actual monthly billings by customer, and the disposition of any remaining amounts; and Trunkline shall be required to serve this report on all parties to this proceeding;

(6) Trunkline shall not be allowed, in the event of non-payment of these billed amounts by any customer to recover such amounts from its other customers; and

(7) Trunkline is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billing costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Trunkline to implement its direct billing proposal as conditioned in this order.

(C) The late motion to intervene filed by Illinois Power Company is granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenor shall be limited to matters affecting asserted rights and interests set forth in its motion to intervene; and provided, further, that the admission of such intervenor shall not be construed as recognition that it might be aggrieved by any order entered in this proceeding.

Commissioners Trabandt and Naeve voted present.

APPENDIX

Intervenors

Association of Businesses Advocating Tariff Equity

Columbia Gas Transmission Corporation [1]

Consumers Power Company [1]

General Service Customer Group [1]

Illinois Commerce Commission

Illinois Power Company [2]

Indiana Gas Company, Inc.[1]

Michigan Consolidated Gas Company

Michigan Gas Utilities Company [1]

Northern Indiana Public Service Company

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[1] Includes protest or comments.

[2] Filed out of time.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-203-000

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, GRANTING WAIVER, PROVIDING FOR HEARING, ESTABLISHING PROCEDURES, AND GRANTING INTERVENTIONS

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Panhandle Eastern Pipe Line Company (Panhandle), on September 23, 1985, filed a petition requesting authorization to use the direct billing procedure for retroactive production-related costs. Panhandle proposes to bill each jurisdictional customer directly for its share of certain payments by Panhandle to its producers and pipeline supplier, Trunkline Gas Company (Trunkline), for retroactive production-related costs incurred over the past period from July 25, 1980 through February 28, 1985. Each customer's portion of the payments would be based on the customer's corresponding portion of total jurisdictional sales during August 1, 1980 through February 28, 1985. The billing amounts, including interest, would be billed in twelve equal monthly installments commencing November 1985, or at the option of the customer,

could be paid through a single lump-sum payment at the initial billing.

In support of its request, Panhandle states that this special billing procedure will accomplish the recovery of the extraordinary costs in a more equitable and orderly fashion than including these amounts in the computations under its Purchased Gas Cost Adjustment (PGA) provision of its tariff. Panhandle states, that this procedure will result in a matching of the incurrence of these costs with the volumes purchased by the customers during the relevant period. Panhandle requests waiver of our regulations and its tariff to permit implementation of this direct billing procedure.

Background

The retroactive production-related costs are authorized under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104 of the Commission's NGPA rules.[2] Under section 110 of the NGPA, generic allowances were established, above the NGPA ceiling prices for natural gas, for production-related costs, which are defined to include cost (other than "production costs") incurred in delivery, compression, treatment and conditioning of natural gas by the producer. The specific generic allowances for production-related costs are set forth in section 271.1104 of our regulations under the NGPA, promulgated as an Interim Rule on January 24, 1983 in Docket Nos. RM80-73 and RM80-74, *FERC Statutes and Regulations* ¶ 30,420 (1983), and as a Final Rule by Order No. 334 issued September 27, 1983, *FERC Statutes and Regulations* ¶ 30,495 (1983). Those allowances were established pursuant to the general policies on recovery of production-related costs developed in Order Nos. 94 and 94-A issued July 25, 1980 and January 24, 1983 in Docket No. RM80-47, *FERC Stat-*

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

utes and Regulations ¶ 30,178 (1980) and ¶ 30,419 (1983). On appeal, the Order No. 94 rule was affirmed.[3]

In the related Order No. 399-A, 29 FERC ¶ 61,254 (1984) [*FERC Statutes and Regulations* ¶ 30,612], producers were authorized to offset their refunds of Btu measurement overcollections against amounts due them for production-related costs. However, the court struck down that offset mechanism.[4] The Commission then provided for payment, by August 30, 1985, of Btu refund amounts from producers who used that offset mechanism[5] and for corresponding purchaser payments for production-related costs by September 30, 1985.[6]

Payments To Be Billed

Panhandle states that it has, or will make by September 30, 1985, substantial payments for production-related costs for the period July 25, 1980 through February 28, 1985. While it has not completed the verification of all of the amounts, Panhandle expects that its payments will total $25.2 million, which include amounts previously offset against producer Btu refunds.

Additionally, Panhandle expects to be billed by Trunkline for approximately $49 million, plus interest, as its portion of production-related cost payments made by Trunkline to its producer suppliers.[7] Panhandle states

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[3] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985) (*Texas Eastern*).

[4] *Interstate Natural Gas Ass'n. of America v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir., 1985).

[5] Order No. 399-B, *FERC Statutes and Regulations* ¶ 30,651 (1985).

[6] Order No. 94-F, *FERC Statutes and Regulations* ¶ 30,654 (1985).

[7] On September 23, 1985, Trunkline filed in Docket No. RP85-202-000 a petition for direct billing with the Commission, which included a request to bill $49,027,365.54 to Panhandle as its portion of production-related costs.

that it proposes to include the amounts to be paid to Trunkline within its direct billing mechanism.

Panhandle agrees to provide the supporting detail for its payments, including the information required by section 271.1104(f) of our regulations and the relevant contract provisions, to the extent such information has not already been provided.

Direct Billing Procedure

Panhandle proposes to collect the amounts actually paid to producers together with interest in accordance with our regulations. Specifically, under the proposal, Panhandle will allocate the amounts among its jurisdictional customers according to the ratio of each customer's total jurisdictional sales during the August 1, 1980 through February 28, 1985 period to the total sales during that same period. The cost amount allocated to each customer, plus interest, will be recouped in twelve equal monthly installments to be separately invoiced commencing November 1, 1985, with each customer having the option to make a lump-sum payment.

To account for this mechanism, Panhandle proposes to establish a separate sub-account of Account No. 191. Panhandle will charge that sub-account its payments to producers and to Trunkline and will credit the amounts received under its direct billing procedure. To the extent Panhandle pays any amount which differs from the estimated amount included, it will debit or credit the difference to the special sub-account. The balance, if any, at the conclusion of the twelve-month installment period will be transferred to the appropriate current sub-account of Account No. 191 for inclusion in the next PGA adjustment. Panhandle proposes to submit a final report showing the actual monthly billings to each customer and the disposition of any final balance in the special sub-account.

Public Notice

Notice of Panhandle's petition was issued on September 26, 1985, with motions to intervene or protests due by

October 4, 1985. Motions and notices of intervention were filed by those listed in the appendix to this order. Pursuant to Rule 214,[8] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in the appendix are also granted in accordance with the conditions of Rule 214.

Late Interventions

Late motions to intervene were filed by the Municipal Defense Group (MDG) and Northern Indiana Public Service Company (Northern Indiana) on October 8, 1985, and by Illinois Power Company (Illinois Power) on October 15, 1985. In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant has good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their motions, MDG, Northern Indiana, and Illinois Power have established an interest in this proceeding and have shown good cause for not filing their motions within the time period prescribed. As this early stage of the proceeding, other parties will not be prejudiced by granting the requests for intervention. Accordingly, the Commission finds that good cause exists to permit these late interventions.

Protests

1. MDG requests the Commission to reject Panhandle's petition or, if not rejected, to hold a hearing "re-

[8] 18 C.F.R. § 385.214 (1985).

lating to the issues".[9] A hearing will be ordered herein based on the protest of General Service Customer Group (GSC), which will be discussed below. However, we disagree with MDG's argument that Panhandle's proposal violates the filed rate doctrine and the rule against retroactive ratemaking. That issue was determined against MDG's position by the *Texas Eastern* court when it responded to a similar argument made in that case:

> In their third challenge, the Producers . . . quarrel with the Commission's failure to make all production-related allowances recoverable retroactive to 1978, the year of the NGPA's passage. The Pipelines and the Associated Gas Distributors, on the other hand, maintain that the allowances should be collectable only from 1983, the time provided for when the allowance was finally established in Order No. 94-B . . . [T]he Commission respond[ed] that it had promised in Order No. 94 that allowances eventually created with respect to interstate gas would be retrotive to [July 25, 1980—the date of issuance of the Interim Rule of Order No. 94]. . .

Slip op., pp. 21-22. The court found that the Commission decision to permit the production-related costs to be collected from the 1980 date was proper because it ". . . was a fair balancing of the various problems involved . . ." (slip op., p. 22). MDG's protest on this issue is rejected.

2. GSC generally supports the petition, but requests that the grant of the petition be conditioned.[10]

(a) GSC requests the Commission to impose a refund condition for any costs charged to the proposed new subaccount of Account No. 191 that are subsequently reduced or eliminated for any reason. In particular, GSC cites to the modification made by the *Texas East-*

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[9] MDG does not specify the issues it requests to be heard.

[10] Michigan Gas Utilities Company supports GSC's condition requests.

ern court where, with Commission agreement, a challenge under the general protest provisions of the NGPA can be held to show that an area rate clause is not subject to the presumptions of Order No. 94-A (slip op., p. 20). GSC's requested condition to impose a refund condition has merit and such a condition is imposed.

(b) GSC requests that a condition be imposed on acceptance of Panhandle's petition to preclude any transfer of the new sub-account's balance at the end of the 12-months collection period. GSC states that such a condition is necessary to assure that customers are not compelled to absorb more than their allocated share of the costs. We agree. The object of this petition is to deal equitably with the allocation of these costs. Those costs initially are divided to assess each customer's proper share of the amount due. To later charge those same customers for amounts not paid by others will require the paying customers to pay a disproportionate share of these costs. We will not condone that result. Panhandle in this order, is given the right to implement its direct billing procedure. If certain customers refuse to pay their proper share of these costs, Panhandle has the right to seek its legal remedy to collect those costs. Therefore, the risks of collection under this proposal should be borne by Panhandle and its stockholders. Those customers that pay their proper share should not be required to pay more. The direct billing mechanism will be amended to preclude the transfer of any balance in the new sub-account at the end of the 12-months period to any account that will require payment from customers other than those specific customers who owe any part or have refused to pay their proper proportionate share of these costs.[11]

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[11] Our disposition of this issue also responds to the similar concern expressed by Michigan Gas Storage Company (Storage Company) in its protest of the filing.

(c) GSC asserts that "at least $4.9 million" of the costs involved here are "the result of fraud, abuse or gross imprudence, and should not be borne by [Panhandle's] customers" (Motion, p.4). GSC requests (as a condition) that Panhandle be directed to remove $4,924,055 (to be allocated pro-rata among its customers) from the amount to be collected at this time and to establish hearing procedures to determine whether those costs were prudently incurred to permit their recovery. GSC cites to Opinion No. 223 [12] where the Commission found that Panhandle had modified its purchased gas pattern to increase takes of high-cost gas from Trunkline during the period relevant to the production-related costs involved in the petition filed in this case. We agree and will set for hearing the issue of whether the purchase gas practice of Panhandle was prudent during the relevant time period to permit it to recover the $4.9 million costs from its customers. However, we will permit Panhandle to collect these amounts in its direct billing proposal subject to refund while the hearing procedures are ongoing.

(d) GSC has also requested that the supporting detail to be supplied by Panhandle, as well as the company's final report showing actual monthly billings to customers, be served upon GSC and all other parties to this proceeding. We agree that the final report submitted by Panhandle to the Commission should be served on all parties in this proceeding and we require Panhandle to do so. As to GSC's request for service of the supporting documentation, including the information required by section 271.1104(f) of the Commission's regulations, we will not require Panhandle to supply such information to all parties. The Commission's regulations require Panhandle to file all supporting documentation with the Commission so that it may be available, at the Commission, to the public.

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[12] *Panhandle Eastern Pipe Line Co.*, 27 FERC ¶ 61,345 (1984); appeal docketed, *sub nom., Panhandle Eastern Pipe Line Co. v. F.E.R.C.*, No. 84-1468 (D.C. Cir., September 11, 1984).

Such supporting documentation is often voluminous and, for that reason, the Commission's practice has been to retain these materials at the Commission and permit the public to view them here.

3. Storage Company and Citizens Gas & Coke Utility (Citizens Gas) request the Commission to require Panhandle to base its monthly billings on actual cash payments made to producers before each billing and to preclude the inclusion of estimates in the bill. We will require Panhandle to base its bills on the amounts actually paid to producers prior to submission. However, the bill may be based on estimates to provide for equal monthly installments.[13]

4. Columbia Gas Transmission Corporation (Columbia) requests denial of the petition. It asserts that Panhandle's proposal is similar to that made by Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) for authority to directly bill certain "extraordinary" retroactive gas purchase costs, which request was denied.[14] However, the *Tennessee* request is not similar to the request in this proceeding. In *Tennessee*, Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission expressed its concern over the uncertainty of the meaning of "extraordinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered gas costs. Here, however, Panhandle's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. Therefore, Columbia's argument on this issue is rejected.

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[13] *See Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985).

[14] *Tennessee Gas Pipeline Co., a Division of Tenneco Inc.*, 29 FERC ¶ 61,150 (1984) (Tennessee).

Columbia also argues that Panhandle's proposal represents a fundamental departure from the Commission's rate treatment. Columbia is wrong. As an equitable and practical method of allocating cost responsibility, the Commission has approved similar direct billing proposals.[15]

Columbia states that its purchases from Panhandle have declined since the retroactive period, and argues that as a consequence, Panhandle's proposal will increase Columbia's gas costs. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals that would result if Panhandle were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Columbia's protest is rejected and its request to reject the petition is denied.

Discussion

Panhandle's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission has approved in previous instances. *See, e.g., Transcontinental Gas Pipe Line Corporation*, 32 FERC ¶ 61,230 (1985) and *Tennessee Gas Pipeline Company*, 31 FERC ¶ 61,380 (1985). We remain cognizant of the concerns expressed by the protesters and other intervenors. We have conditioned our acceptance of Panhandle's petition, as appropriate, to meet the legitimate concerns of these parties.

With the conditions outlined below and discussed in the order, we will approve Panhandle's proposal, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure;

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[15] *See, e.g., Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985); *Consolidated Gas Transmission Corp.*, 32 FERC ¶ 61,448 (1985).

any amounts so paid and collected are subject to refund.[16] Further, any amounts in dispute between Panhandle and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Panhandle's petiton for direct billing filed in Docket No. RP85-203-000 on September 23, 1985, is granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Panhandle shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Panhandle shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(c) (1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Panhandle and its suppliers are excluded from the direct billing procedure;

(5) Panhandle is required to file a report, within 30 days of the end of the 12-month billing period, that details Panhandle's actual monthly billings by customer, and the disposition of any remaining amounts; and Panhandle

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[16] All of Panhandle's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e). Further, amounts that Panhandle pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are not permitted automatic passthrough under section 610(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

shall be required to serve this report on all parties to this proceeding;

(6) Panhandle shall not be allowed, in the event of nonpayment of these billed amounts by any customer to recover such amounts from its other customers; and

(7) Panhandle is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billing costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations and Panhandle's tariff is granted to the extent necessary to permit Panhandle to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by Illinois Power, Northern Indiana and MDG are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, and 15 thereof, and the Commission's rules and regulations, a public hearing shall be held concerning the purchasing gas practice issue identified in the text of this order.

(E) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge for that purpose (18 C.F.R. 375.304), shall convene a prehearing conference in this proceeding to be held within 45 days after the issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 825

North Capitol Street, N.E., Washington, DC 20426. The prehearing conference shall be held for the purpose of establishing procedures for the resolution of the issue set for hearing.

Commissioners Trabandt and Naeve voted present.

APPENDIX

Intervenors

Association of Business Advocating Tariff Equity

Citizens Gas & Coke Utility

Columbia Gas Transmission Corporation

East Ohio Gas Company

General Service Customer Group

Illinois Commerce Commission

Indiana Gas Company, Inc.

Michigan Consolidated Gas Company

Michigan Gas Storage Company

Michigan Gas Utilities Company

Process Gas Consumers Group

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA85-3-29-003, TA85-3-29-004, TA85-3-29-005, TA85-3-29-006, RP85-148-001, RP85-148-002, RP85-148-003, and RP85-148-004

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER DENYING REHEARING AND CLARIFICATION

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order issued August 15, 1985, the Commission granted, with certain conditions, a petition by Transcontinental Gas Pipe Line Corporation (Transco) to institute a special procedure to directly bill its customers for about $127 million in retroactive production-related cost allowances it has paid or will pay its natural gas suppliers.[1]

Timely motions to intervene were filed by Brooklyn Union Gas Company (Brooklyn Union), Columbia Gas Transmission Corporation (Columbia), Public Service Electric and Gas Company (PSE&G), and Transco. Transco also filed a motion for clarification.

On October 15, 1985, the Commission granted rehearing solely for the purpose of further consideration. For the reasons stated below, we shall deny the requests

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[1] 32 FERC ¶ 61,230 (1985).

for rehearing by Brooklyn Union, Columbia, PSE&G and Transco, and also deny Transco's motion for clarification.

Brooklyn Union's Application for Rehearing

In its application for rehearing, Brooklyn Union requests that the Commission issue an order requiring Transco to identify all disputed charges or payments for gathering and delivery allowances and to exclude these from the direct billing procedure until the disputes are resolved by issuance of a final non-appealable order.

In our August 15, 1985 order we observed that any amounts in dispute between Transco and its suppliers are automatically excluded from the direct billing procedure. We further observed that disputes as to the amounts that are directly billed can be raised before the Production-Related Costs Board.[2] Therefore, any dispute as to charges or payments which Brooklyn Union, or any other party, desires to raise may be addressed by the procedures set out in § 271.1105.[3]

Brooklyn Union further requests that with respect to those charges or payments which Transco claims are not disputed and have been made in reliance on an area rate clause, Transco should be ordered to provide the basis for its conclusion. Brooklyn Union requests this so that affected parties will have a meaningful opportunity to assess the reasonableness and validity of the claim that such charges are "expressly authorized" within the meaning of § 227.1105(a)(3) before they are billed. Here, Brooklyn Union claims, Transco should be ordered to identify all those charges or payments where the only authority for collection of gathering and delivery allowances is an area rate clause.

In support of its request, Brooklyn Union argues that the necessary result of the Fifth Circuit decision in

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[2] 32 FERC ¶ 61,230, at p. 61,544.

[3] 18 C.F.R. § 271.1105 (1984).

Texas Eastern Transmission Corp. v. F.E.R.C.[4] is that area rate clauses do not, without more, automatically provide contractual authority for recovery of section 110 gathering allowances, and that this creates a category of potential "amounts in dispute" between Transco and its suppliers. Accordingly, Brooklyn Union contends that these amounts, under the express terms of the August 15 order, may not be included in the direct billing procedure.

In *Texas Eastern*, the court stated that the Commission "should amend its Order 94-A [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419] to make clear that in a particular case, an aggrieved party is entitled to attempt to show that its area rate clause is not subject to the presumptions of Order 94-A."[5] The relevant presumption in Order No. 94-A is that an area rate clause *can* be used to collect delivery allowances.[6] Therefore, this order by the court, together with the relevant presumption in Order No. 94-A, does not call for prior Commission approval by Transco to bill its customers for section 110 gathering allowances incurred under area rate clauses of its contracts.

Furthermore, we emphasize again, as we did in the August 15 order, that we are only approving a billing procedure. In so doing, we make no decision on the validity of the allowances themselves. Any production-related cost allowances paid or collected as part of this procedure, and any amounts so paid and collected are subject to refund.[7]

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[4] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir.) slip opinion issued August 19, 1985. (hereinafter referred to as the "Texas Eastern" decision)

[5] Texas Eastern at 6567.

[6] 18 C.F.R. § 271.1104(c)(4)(ii)(B).

[7] 32 FERC ¶ 61,230, at p. 61,544.

Finally, Brooklyn Union also requested the Commission, as it did in its original protest, to order Transco to submit revised tariff sheets which delineate the mechanism for evaluating and assessing Order 94 charges [*FERC States and Regulations, Regulations Preambles 1977-1981* ¶ 30,178]. Brooklyn Union states that the *Texas Eastern* decision creates additional concern over the lack of tariff sheets for these direct billing amounts since the decision raises serious questions as to whether or not contractual authority exists for the recovery of the section 110 gathering allowances Transco proposes to bill directly. We reject Brooklyn Union's request for the reasons given in our August 15 order.[8]

PSE&G's Motion for Rehearing

Transco has already collected $32.3 million of retroactive payments from its customers through its PGA. In order to treat its customers as if it had not previously passed through any of these retroactive allowances, Transco proposed to refund this $32.3 million amount to its customers and then, after reallocating these payments in accordance with the matching principal in its proposal, directly bill these amounts as if they had not been previously recovered.

PSE&G requests that the Commission, on rehearing, disallow refund of the $32.3 million already collected by Transco. Accordingly, PSE&G requests the Commission to require Transco to reduce its total retroactive Order No. 94-A amounts by the $32.3 million prior to allocating these remaining charges to Transco's customers.

In support of its request, PSE&G states that it will receive a refund of approximately $3.2 million and then pay surcharges related to the same principal amount of approximately $5.2 million. PSE&G asserts that this result was not contemplated in the Commission's discus-

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[8] 32 FERC ¶ 61,230, at p. 61,545.

sion of Transco's refund obligation. PSE&G also claims that this result is unreasonable.

PSE&G raised a similar argument in its original protest. The direct billing procedure bases its charges on actual purchases in the retroactive period, rather than on future purchases. It necessarily follows that the amount calculated to be a customer's share of the retroactive allowances under the direct billing approach may be more (or less) than the PGA passthrough method. The direct billing procedure avoids the problem of customers who are now purchasing gas at much lower levels, than during the period when the production-related costs were incurred, from not absorbing their proper cost allocation of these costs. PSE&G is paying more because it purchased higher volumes of gas during the past billing period, when the costs were incurred, than it currently purchases.

Columbia's Motion for Rehearing

In its rehearing request, Columbia asserts that the Commission's decision in the August 15 order constitutes retroactive ratemaking. In support of this conclusion, Columbia argues that Order No. 94-A in no way addressed the issue of whether pipeline rates may be increased retroactively. Also, Columbia says the impact of the direct billing procedure is to retroactively increase the cost of gas Columbia purchased from Transco in the past.

Columbia's argument is a collateral attack on Order Nos. 94 and 94-A. In Order No. 94 the Commission provided that the delivery allowances which would eventually be allowed, except for intrastate gas, would be retroactive to the date Order No. 94 was issued.[9] This provision survived the scrutiny of the Fifth Circuit in the *Texas*

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[9] Order No. 94 *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶ 30,178, at p. 31,230 (1980).

Eastern decision.[10] Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.[11] Pursuant to section 601 (b)(1) and (c)(2) of the NGPA,[12] these amounts are deemed just and reasonable for purposes of the Natural Gas Act and are guaranteed passthrough by the interstate pipeline purchaser even though the charges relate to past deliveries of gas. Furthermore, as we observed in *Tennessee Gas Pipeline Co.*,[13] direct billing for retroactive section 110 allowances based on prior deliveries is consistent with our PGA regulations (18 C.F.R. § 154.38) insofar as it permits Transco to recover, after the fact, the difference between its previously estimated purchased gas costs and its actual purchased gas costs. Therefore, the authorization of the refund and the subsequent direct billing is not retroactive ratemaking, but merely a carrying out of existing rules.

Columbia further states that the August 15 order subverts the PGA regulations. Columbia asserts that in the past similar accounts were recovered through Account No. 191 on a 12-month surcharge over future sales. Columbia asks why these Order No. 94 retroactive costs are sufficiently different from other large retroactive costs such as to be appropriate for special treatment. These amounts are different than other amounts because they were authorized by special rule on a continuing, not a one time only, basis and are so large as to warrant special treatment.

As stated in the August 15 order, the Commission believes that Transco's proposal, concerning Order No. 94

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[10] Texas Eastern at 6569.

[11] Order No. 94-A, *FERC Statutes and Regulations* ¶ 30,419, at p. 30,381 (1983).

[12] 15 U.S.C. §§ 3431(b)(1) and (c)(2).

[13] 31 FERC ¶ 61,308, at p. 61,694 (1985).

retroactive costs, is equitable. It is administratively effective, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Furthermore, we noted that it will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility.

Also, Columbia states that the sole effect of the August 15 order is to enhance the marketability of Transco's gas supply. Here, Columbia relies on the reasons enunciacted in *Tennessee Gas Pipeline Corp.* (*Tennessee*).[14] In *Tennessee* the Commission rejected a settlement which would have eliminated a refund and, instead, reduced Tennessee's PGA. That decision was grounded on the equitable consideration that customers who are due a refund should be allowed to get it without being required to buy more gas first.[15]

Further, the Commission said that the proposal would artificially reduce Tennessee's PGA, which, in turn, would artificially enhance the marketability of its gas supply. Such a situation is not present in this case. Here, we are concerned with the passthrough of retroactively increased charges which would otherwise distort the *true* cost of Transco's gas supply. The method as proposed by Transco will equitably bill customers for the higher amounts they should have paid based on actual purchases during the past billing periods. Furthermore, this method will more accurately allow the true cost of current gas supplies to be reflected in Transco's PGA. Consequently, on balance, we find that the equities, and the need for proper market signals, outweigh any concerns that Transco may have had an ulterior motive regarding the marketability of its supplies.

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[14] 32 FERC ¶ 61,086 (1985) *reh. den.* 32 FERC ¶ 61,347 (1985).

[15] *See Tennessee Gas Pipeline Co., a division of Tenneco Inc.*, 33 FERC ¶ 61,006, mimeo at 9 (October 9, 1985).

Finally, Columbia argues that the Commission's order will prevent clear market signals. Columbia argues that direct billing prevents a purchaser from knowing the true cost of its various suppliers' gas and from making an intelligent option to purchase the least cost supply if the Commission permits additional costs to be tacked on to such purchases several years later. Columbia's argument lacks merit. Order No. 94 put all pipelines on notice that purchased gas costs could increase by the amount of the section 110 allowances. Moreover, and as we noted above, direct billing prevents a distortion in market signals by permitting the true current cost of gas to be more accurately reflected in Transco's rates.

Transco's Motion for Clarification or Rehearing

Transco seeks clarification or, in the alternative, rehearing on the issue of the interest rate to be applied to the $32.2 million refund. In the August 15 order, the Commission stated that section 154.67(c)(2)[16] should apply to the refund of the $32.3 million in previously collected amounts, and that section 154.38(d)(iv)(c)[17] should apply for purposes of direct billing. Transco claims that the use of these two sections in the above manner causes Transco to under recoup approximately $940,000 of interest.

First, Transco requests that the Commission clarify that the $940,000 of additional interest on the $32.3 million of refunds should be included in the amounts to be directly billed by Transco. However, the direct billing methodology we approved requires interest amounts to be calculated consistent with how such amounts would be calculated had they been reflected in Transco's Account

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[16] 18 C.F.R. § 154.67(c)(2) (1984).

[17] 18 C.F.R. § 154.38(d)(4)(iv)(c) (1984).

191.[18] Transco argues that the section 154.67(c)(2) interest rate for refunds is not appropriate in this case. Transco claims that these interest rates are intended to apply to collections which are later found not to have been justified, i.e., to instances of overcollections.

The $940,000 is the difference in interest Transco will pay its customers when it refunds the $32.3 million under section 154.67 and the interest it receives when it direct bills that amount with interest calculated under section 154.38. That difference in interest is attributable to the difference in calculating interest under those two sections. Under section 154.38, interperiod tax effects must be considered in calculating the interest.

The issue of the appropriate rate for refunds has been addressed in Order No. 47, Docket No. RM77-22 (September 10, 1979) *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,083. In Order No. 47, the Commission weighed various concerns of interested parties and then determined that customers are entitled to a refund based upon the entire overpayment.[19] This is now the general procedure applied to refunds. By allowing refund of the $32.3 million, we are recognizing that these amounts were prematurely collected. Hence, the customers are entitled to the Commission's general rate of interest on these refund monies.

Finally, Transco argues that the Commission intended to penalize Transco. The Commission does not intend to penalize Transco. However, as we have explained, the circumstances here require that we apply the rate of interest generally applicable to refunds with regard to the $32.3 million refund. We note that Transco came forward with the direct billing procedure, including the refund of previously collected amounts.

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[18] *Natural Gas Pipeline Co. of America*, 30 FERC ¶ 61,138, at p. 61,246 (1985).

[19] Order No. 47 at p. 30,548.

The Commission orders:

(A) The request by Brooklyn Union for rehearing in Docket Nos. RP85-148-001 and TA85-3-29-003 is denied.

(B) The request by Columbia for rehearing in Docket Nos. RP85-148-002 and TA 85-3-29-004 is denied.

(C) The request by PSE&G for rehearing in Docket Nos. RP85-148-003 and TA85-3-29-005 is denied.

(D) The request by Transco for rehearing, or in the alternative, clarification in Docket Nos. RP85-148-004 and TA85-3-29-006 is denied.

Commissioners Trabandt and Naeve voted present.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-170-002

TEXAS EASTERN TRANSMISSION CORPORATION

NOTICE OF DENIAL OF REHEARING

(Issued November 25, 1985)

By Direction of the Commission: Kenneth F. Plumb, Secretary.

Take notice that the Commission agreed at its meeting of November 20, 1985, to take no action on the request for rehearing of its September 30, 1985 order granting petition to institute direct billing (32 FERC ¶ 61,493) filed by Columbia Gas Transmission Corp. on October 25, 1985. Accordingly, the request for rehearing is denied pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and Rule 713(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(f) (1985).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-181-001

TEXAS GAS TRANSMISSION CORPORATION

NOTICE OF DENIAL OF REHEARING

(Issued December 13, 1985)

Kenneth F. Plumb, Secretary.

Take notice that the Commission agreed at its meeting of December 4, 1985, to take no action on the request for rehearing of its October 16, 1985 order granting petition to institute direct billing (33 FERC ¶ 61,032) filed by Columbia Gas Transmission Corp. on October 25, 1985. Accordingly, the request for rehearing is denied pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and Rule 713(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(f) (1985).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-202-001

TRUNKLINE GAS COMPANY

ORDER DENYING REHEARING

(Issued January 15, 1986)

Before Commissioners: A. G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order issued November 14, 1985,[1] the Commission granted, with certain conditions, a petition by Trunkline Gas Company (Trunkline) to institute a special procedure to directly bill its customers for approximately $107 million in retroactive production-related cost allowances it has paid or will pay its natural gas suppliers under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104[3] of the Commission's NGPA rules.

Columbia Gas Transmission Corporation's Request For Rehearing

On December 16, 1985, Columbia Gas Transmission Corporation (Columbia) filed a request for rehearing of the Commission's November 14, 1985 order. Many of the arguments presented by Columbia were considered and

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[1] 33 FERC ¶ 61,217 (1985).

[2] 15 U.S.C. § 3320(a)(2).

[3] 18 C.F.R. § 271.1104 (1984).

rejected in our November 14, 1985 order. The Commission finds that Columbia has presented no new arguments that would warrant departure from our November 14, 1985 order.

In its request for rehearing, Columbia asserts that the Commission's decision in our November 14 order constitutes retroactive ratemaking. Columbia argues that Order No. 94[4] failed to address whether pipeline rates may be increased retroactively. Also, Columbia states that the impact of the direct billing procedure is to retroactively increase the cost of gas Columbia purchased from Trunkline in the past.

Columbia's argument is a collateral attack on Order No. 94 and 94-A.[5] In Order No. 94 the Commission provided that the gathering and compression allowances which would eventually be allowed, would be retroactive to the date Order No. 94 was issued.[6] Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.[7] The argument that direct billing constitutes retroactive ratemaking was fully considered and rejected in *Tennessee Gas Pipeline Co.* (Tennessee),[8] wherein we approved a similar direct billing proposal submitted by Tennessee.

In its request for rehearing, Columbia states that retroactive gas cost increases have historically been recovered through the PGA mechanism, and questions why Order No. 94 retroactive costs are to be accorded special

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[4] Order No. 94, *FERC Statutes & Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980).

[5] Order No. 94-A, *FERC Statutes & Regulations* ¶ 30,419, at p. 30,381 (1983).

[6] *FERC Statutes & Regulations, Regulations Preambles 1977-1981* ¶ 30,178, at p. 31,230 (1980).

[7] *FERC Statutes & Regulations* ¶ 30,419, at p. 30,381 (1983).

[8] 31 FERC ¶ 61,308, at p. 61,694 (1985).

treatment. As the Commission has stated in prior orders,[9] these retroactive Order No. 94 amounts are distinguishable from other large retroactive costs because they were authorized by special rule on a continuing, not a one-time-only basis, and are so large as to warrant special treatment. Further, Trunkline's direct billing procedure will permit it to assign production-related costs to its customers in proportion to their actual purchases of gas during the retroactive period, instead of on the basis of their future purchases from Trunkline (as would be the case if recovery was through a PGA surcharge).

Further, Columbia states that the effect of our November 14, 1985, order is to enhance the marketability of Trunkline's gas. In support of this assertion, Columbia relies on the Commission's decision in *Tennessee Gas Pipeline Co.*,[10] where the Commission rejected a settlement which would have eliminated a Tennessee section 4 rate case refund and instead, reduced the applicable surcharge in Tennessee's PGA. The Commission said that Tennessee's proposal would artificially reduce its PGA, and, in turn, artificially enhance the marketability of its gas supply. Trunkline's direct billing proposal does not present a similar situation. Here, we have permitted Trunkline to bill its customers for retroactive charges which otherwise would distort the true cost of Trunkline's current gas supply. Our November 14, 1985 order accepted Trunkline's proposal as an equitable and practical method of allocating cost responsibility.

Finally, Columbia argues that approval of the direct billing procedure penalizes Columbia for following a least-cost purchasing policy and prevents a purchaser from knowing the true cost of its suppliers' gas. We reject Columbia's argument. The promulgation of Order No.

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[9] *See Transcontinental Gas Pipe Line Corp.*, Order Denying Rehearing, 33 FERC ¶ 61,213 (1985).

[10] 32 FERC ¶ 61,086 (1985), *reh. den.* 32 FERC ¶ 61,347 (1985).

94 put pipeline companies on notice that purchased gas costs could increase by the amount of the production-related costs. As stated in our November 14 order, the Commission believes that direct billing prevents a distortion in market signals by permitting the true current cost of gas to be reflected in Trunkline's rates.

For the reasons stated above, we find Columbia's arguments to be without merit and we therefore deny its request for rehearing.

The Commission orders:

The request by Columbia for rehearing is denied.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP85-203-001 and RP85-203-002

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DENYING REHEARING

(Issued February 20, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order on November 14, 1985,[1] the Commission granted, with certain conditions, a petition by Panhandle Eastern Pipe Line Company (Panhandle) to institute a special procedure to directly bill its customers for retroactive production-related cost allowances it has paid or will pay to its producers and pipeline suppliers. These amounts were incurred over the past period from July 25, 1980 through February 28, 1985, under section 110 (a) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104 of the Commission's NGPA rules.[3] On December 16, 1985, Columbia Gas Transmission Corporation (Columbia) and the Municipal Defense Group (MDG) filed requests for rehearing.[4] For the reasons stated below, rehearing will be denied.

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[1] 33 FERC ¶ 61,218 (1985).

[2] 15 U.S.C. § 3320(a)(2).

[3] 18 C.F.R. § 271.1104(1984).

[4] The Commission issued an order granting rehearing solely for the purpose of further consideration on January 15, 1986.

Requests for Rehearing

In their requests for rehearing, MDG and Columbia assert that the Commission's decision constitutes retroactive ratemaking. In addition, Columbia asserts that retroactive gas cost increases have historically been recovered through the PGA mechanism; that a direct-billing mechanism would frustrate the Commission's least-cost purchasing policy for pipelines; and that such a mechanism would result in a distortion of market signals.

All of the arguments presented by MDG and Columbia have been fully considered and rejected in previous Commission orders issued in *Trunkline Gas Co.*,[5] *Tennessee Gas Pipeline Co.*,[6] and *Transcontinental Gas Pipe Line Corp.*,[7] which authorized the institution of direct-billing procedures for retroactive production related cost allowances. In those orders, and in the November 14, 1985 order in the subject proceeding, we stated that a claim of retroactive ratemaking constitutes a collateral attack on Order Nos. 94[8] and 94-A.[9] In Order No. 94 the Commission provided that the gathering and compression allowances which would eventually be allowed would be retroactive to the date Order No. 94 was issued. Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.

Concerning the arguments presented by Columbia with respect to the flow-through of these costs in the PGA, the Commission stated in the November 14, 1985 order that

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[5] 33 FERC ¶ 61,217 (1985); *reh'g denied*, 34 FERC ¶ 61,021 (1986).

[6] 31 FERC ¶ 61,308, at p. 61,695 (1985).

[7] 32 FERC ¶ 61,230 (1985), *reh'g denied*, 33 FERC ¶ 61,213 (1985).

[8] Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980).

[9] Order No. 94-A, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419.

the direct-billing mechanism avoids the distortion of market signals that would result if Panhandle were to pass through Order No. 94 amounts in its PGA and charge increased commodity rates to all of its customers.

The arguments presented by MDG and Columbia here were considered and rejected in our order of November 14, 1985 when we considered their protests. The Commission finds that MDG and Columbia have presented no new arguments or support for their positions that would warrant departure from our November 14, 1985 order. Accordingly, the requests for rehearing filed by MDG and Columbia shall be denied.

The Commission orders:

The requests for rehearing filed by MDG and Columbia are denied.

STATUTORY PROVISIONS

NATURAL GAS POLICY ACT OF 1978

Section 110(a), 15 U.S.C. § 3320(a). Treatment of State severance taxes and certain production-related costs

(a) Allowance for State severance taxes and certain production-related costs

Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

Section 601(c)(2), 15 U.S.C. § 3431(c)(2). Coordination with the Natural Gas Act

* * * *

(c) Guaranteed passthrough

(2) Recovery of just and reasonable prices paid

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for

purposes of sections 4 and 5 of such Act [15 U.S.C. 717c, 717d], and

(B) such recovery is not inconsistent with any requirement of any rule under section 3341 of this title (including any amendment under section 3342 of this title),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Section 4, 15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commisison otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the

rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding intiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may; by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a), 15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or

sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.